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# CLAREMONT JOURNAL OF LAW AND PUBLIC POLICY

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# In This Issue



# Executive Board



# About

*The Claremont Journal of Law and Public Policy* is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The CJLPP is also proud to spearhead the *Intercollegiate Law Journal* project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

# Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to info.5clpp@gmail.com. We use the Chicago style for citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

# Letter from the Editor-in-Chief

Dear Readers,

Welcome to the tenth print edition—Vol. 5, No. 3—of the *Claremont Journal of Law and Public Policy* (CJLPP)! After reviewing many highly-qualified submissions, the editorial team is delighted to feature several particularly stimulating papers and two abridged interview articles in this issue. For our digital content as well as submissions from across the U.S. and overseas, please be sure to visit our website at www.5clpp.com.

This print edition, as well as our regular digital content, would not have been possible without the hard work our team tirelessly contributed. My sincere gratitude goes to all CJLPP writers and guest contributors; senior editors Arthur Chang, Audrey Jang, Desiree Santos, Emily Zheng, Isaac Cui, and Jerry Yan; interview editor Kaela Cote-Stemmermann; digital content editors Allie Carter and John Nikolaou; design editor Noah Levine and layout editor Daphne Yang; as well as webmaster Wentao Guo. Our business team, led by Chief Operating Officer Greer Levin, has meanwhile hosted a series of engaging law/public policy events throughout the semester. A big thank-you goes to business directors Ali Kapadia, Franco Liu, and Kim Tran, as well as project managers Elise Van Scoy and Erin Burke.

I am writing to you in April, when Commencement 2018 is just around the corner: a bittersweet time of the year for seniors as we prepare to run through the College gates once more with our classmates, ready to pass the torch to those who will continue our work. It would not be an overstatement to say that my work with the CJLPP has been a true highlight of my Claremont years. It has been extraordinarily rewarding to witness, and indeed be part of, the exciting growth of this student publication. From a vision our founder Byron Cohen (CMC '16) had as a young college student passionate about legal and policy debates, to a well-recognised campus publication, to an established law journal that routinely accepts publications from various corners of the world and a leader among our peer journals with the *Intercollegiate Law Journal* (ILJ) project, the CJLPP and our members have grown together in many important ways. I am immensely proud of everything we have collectively accomplished, and cannot wait to keep up with all the future developments of this group. I would like to voice my deepest gratitude to Byron Cohen for starting this wonderful journal and his continued guidance over the years, as well as to my predecessor Martin Sicilian (PO '17) for being a constant source of inspiration.

As we step into the weeks leading up to graduation, I would also like to take this opportunity to thank my fellow graduating seniors: Jerry Yan, who joined the journal at the start of his sophomore year and has continuously contributed to our community through his writing and editing; Jessie Levin, a talented staff writer whose work has been featured several times on our website; Noah Levine, who has played an instrumental role in all design aspects for the CJLPP and ILJ alike; and Kaela Cote-Stemermann, our amazing interview editor. While we will greatly miss contributing to the CJLPP firsthand, we are glad that with our strengthened alumni network, we will be keeping in touch with current and future CJLPP members.

Here, I would like to congratulate Greer Levin, our newly elected Editor-in-Chief, and Isaac Cui, our inaugural Managing Editor—two highly respected members of the current executive board—on their new positions. Both of them have continuously shown a genuine dedication to the journal since they first joined the group. I have no doubt that Greer and Isaac will do a truly fabulous job leading the journal.

As always, I would like to close my Letter by thanking our faculty advisor, Prof. Amanda Hollis-Brusky, for her continued guidance and mentorship. Our journal is also indebted to the Salvatori Center, Scheidemantle Law Group, the Atheneum, the 5C politics, legal studies, and public policy departments, for their support over the years, as well as to all of our readers, partners, alumni, prospective members, and other supporters.

If you enjoy reading our articles and would like to share your own writing, keep in mind that the CJLPP always welcomes submissions to our blog and future print editions. Please refer to the "Submissions" page on our website for details. In addition, for our Claremont readers, if you feel that you could be a valuable addition to our team, I invite you to visit our "Hiring" page for potential openings or email us at info.5clpp@gmail.com.

Happy Reading!

With Love,
April Xiaoyi Xu
Editor-in-Chief

# Dancing the Line: *Cooper v. Harris*

## *A landmark decision on gerrymandering and judicial implementation of civil rights*

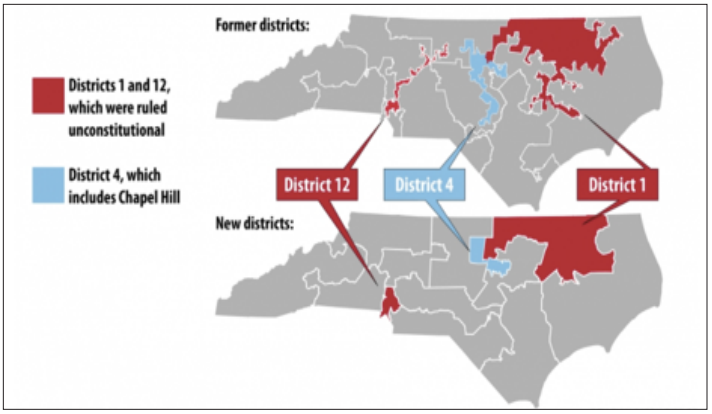
Lea Kayali (PO '19)
Staff Writer

Race matters. Police brutality, immigration, and criminal justice reforms—these hot-button debates reflect how racial issues are front and center in American politics. As racialized politics percolate through party platforms,[1] Americans' political identity is increasingly determined by demographics. White nationalism is on the rise in the self-proclaimed "alt-right," and identity politics dominates the left as well.[2] Religious, ethnic, and racial minorities are increasingly alienated by white conservatives and vice versa.[3] The link between race and politics today is a thorny one, since diluting the minority vote is politically advantageous for conservatives—an unpleasant yet unavoidable truth since racial minority communities are often politically coherent and liberal, meaning they usually vote for Democratic candidates.[4] Central to this is the practice of gerrymandering—the redistricting of voting regions for partisan benefit. Constitutional questions regarding racial discrimination are thus ensnared in the borders between electoral districts. Gerrymandering runs deep into the connection between race and politics, raising the question: when redistricting disproportionately impacts people of color, is the Fourteenth Amendment, which guarantees equal protection under the law, violated? This practice remains a heated debate within our justice system, with gerrymandering cases constantly coming to the docket of the Supreme Court.[5] These cases act as a springboard for discussions on how the courts should address redistricting, minority voters' rights, and political representation at large.

As the most recent gerrymandering case to be decided, the opinion in *Cooper v. Harris* (2017)[6] holds extreme importance for legislative representation and civil rights. When a court strikes down an instance of racial gerrymandering, it can either combat voter dilution or gut the prolific Voting Rights Act (VRA), depending on the context. Established in 1965 under the Johnson administration, the VRA was created to abolish the obstacles that prevented minorities from voting in the era of segregation. Since that time, the VRA has come into play each time the question of racial discrimination overlaps with gerrymandering. In this paper, I trace the precedent leading up to *Cooper v. Harris* and argue that the Court's decision in Harris allows for future, more robust challenges to gerrymandering where racial discrimination may effectively be taking place.[7]

### The Case

*Cooper v. Harris* concerns the redistricting of two infamous North Carolina districts: District 1 and District 12, as shown below.[8,9,10]




Redistricting—the process by which states draw up legislative districts for representation purposes—varies from state to state. In most states, like North Carolina, the state legislature has the authority to compose these districts, though other states use methods like bipartisan councils, independent authorities, or gubernatorial processes.[11] Redistricting opens the door to gerrymandering. Gerrymandering is especially common when state legislatures have the power over district lines. Currently, gerrymandering primarily on the basis of political affiliation has not been ruled unconstitutional, but gerrymandering on the basis of race has.[12]

1 In the 2016 presidential election, this phenomena became undeniable. Party platforms incorporated the language of race, ethnicity, and religion more heavily than they had in the past. Donald Trump's campaign referred to immigrants from Latin American and Middle Eastern descent in highly controversial ways, while Democratic platform explicitly addressed hot-button topics concerning minority communities (such as immigration, police brutality, etc.) to mobilize those communities for political gain. See, *e.g.*, Derek Thompson, "Donald Trump's Language Is Reshaping American Politics," *The Atlantic*, February 15, 2018, https://www.theatlantic.com/politics/archive/2018/02/donald-trumps-language-is-reshaping-american-politics/553349/; Alexander Burns and Jonathan Martin, "Clinton Pushes Minority Turnout as Trump Tries to Rally His Base," *The New York Times,* November 3, 2016, https://www.nytimes.com/2016/11/04/us/politics/campaign-trump-clinton.html.

2 *Ibid.*

3 "Partisanship and Political Animosity in 2016: Highly negative views of the opposing party – and its members", *Pew Research Center,* June 22, 2016, http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/.

4 "A Deep Dive into Party Affiliation: Sharp Differences by Race, Gender, Generation, Education", *Pew Research Center*, April 7, 2015, http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/#.

5 Cases which challenge acts of gerrymandering are appealed to the Supreme Court each year, many of which the Court takes up. In the last 20 years, the Court has seen nearly a dozen gerrymandering cases. See *Cooper v. Harris*, 581 137 S.Ct. 1455 (2017).

6 *Ibid.*

7 Amy Howe, "Opinion analysis: Court strikes down N.C. districts in racial gerrymandering challenge", *SCOTUS Blog*, May 22, 2017, http://www.scotusblog.com/2017/05/opinion-analysis-court-strikes-n-c-districts-racial-gerrymandering-challenge/.

8 See generally, *Cooper v. Harris, supra* note 5.

9 Image: District 1, 4 (unchallenged in Harris), and 12: before and after the Supreme Court decision. Image from Corey Risinger, "New map draws unexpected consequences in 2016 primaries," *The Daily Tar Heel*, February 21, 2016, http://www.dailytarheel.com/article/2016/02/delayed-congressional-primaries-redistricting.

10 Interestingly, according to the Voting Rights Act, various districts within North Carolina have previously had to clear any voting-related policy changes with the Department of Justice in order to ensure that the state is not repressing minority voter. Historically, the federal government has had to intervene with North Carolina's history of voter suppression. *Cooper v. Harris*, supra note 5, at 1464-1465.

11 See "Redistricting Process," National Conference of State Legislatures, online at: http://www.ncsl.org/research/redistricting/redistricting-process.aspx.

12 In *Shaw v. Reno* in 1993, the Court published the first groundbreaking decision on

North Carolina's Districts 1 and 12 have large African American populations, but prior to the redistricting that this case concerns, African Americans did not make up a majority of the voting-age citizens in either district. Therefore, neither was a majority-minority district. Regardless, these regions consistently elected the preferred candidate of the majority of African American voters, meaning that the districts were acting in lock-step with minority interests. Courts call such districts "crossover" districts, and in this case—as in most cases—such districts vote Democrat. When the chairs of the redistricting committee in North Carolina (State Senator Robert Rucho and Representative David Lewis—both Republicans) spoke publicly of their redistricting goals, they suggested that, in District 1 at least, they intended to create a majority-minority district in order to comply with the Voting Rights Act. In District 12 the creators claimed to be acting only in their political interests by creating more Republican-voting districts. Allegedly the representatives had no knowledge of the demographics of those who were being pushed into the new regions. The district court rejected these claims. Seeing as the vast majority of the additions to District 1 were African American households, the court held that racial motivations dominated.[13]

Though the intentions of the mapmakers remain suspect, the fruits of their labors are clear. The resulting district map snakes through neighborhoods, collecting African American voting age citizens along the way. In the wake of this redistricting, Black voters felt that the power of their vote was diluted since they were being packed into a district that was already voting in their interest. The resulting legal action created the dispute in *Cooper v. Harris*.

In order to prove voter dilution has taken place, courts scrutinize the facts of the case against the standard set in the 1986 case of *Thornburg v. Gingles*.[14] *Gingles* establishes that if the following three threshold conditions apply, and further specific factual conditions are established, then the state has good reason to create a majority-minority district:

(1) A "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district,

(2) the minority group must be "politically cohesive,"

(3) a district's white majority must "vote sufficiently as a bloc" to usually "defeat the minority's preferred candidate."[15]

On the flip side, if one of these conditions is not met but a community is nonetheless packed into a majority-minority district, it is also likely that voter dilution occurred. In *Harris*, the majority held that voter dilution had taken place and further questioned the other reasons stated for creating the district. Ultimately, Justice Kagan, in delivering the opinion of the Court, created new guidelines for racial gerrymandering cases that will define the future of the issue, providing coming sessions of the Supreme Court the tools to regulate and potentially abolish political gerrymandering.

**The Decision**

The Justices in the majority pointed out an important nuance of political gerrymandering: when politicians pack Democrats into districts, they are often effectively diminishing minority voting power. In cases of gerrymandering, like in *Harris*, creators of the district are not just Republican and the constituents Democrats; the map makers are White and the citizens are Black. Though political gerrymandering is currently constitutional, the line between political and racial motivations is a hard line to draw. In District 1, where the defendants claimed that the redistricting was to comply with the VRA,[16] the racist undertones were even clearer. By diluting the Black vote, this redistricting did precisely the opposite of what the VRA was designed to do. In previous cases, the Supreme Court established that if racial reasons predominate in redistricting, the Equal Protection Clause of the Fourteenth Amendment is violated.[17] In this case, the justices lowered the hurdles for plaintiffs making such a claim.

In delivering the majority decision, Justice Kagan explained that "the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."[18] Essentially, Justice Kagan purported that even if race predominates in redistricting in order to achieve political aims, the redistricting is still unconstitutional. Justice Kagan took this claim one step further, asserting that the Court "[has] construed that ban to extend to 'vote dilution'—brought about, most relevantly here, by the 'dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters."[19]

Additionally, the majority covered new ground on the evidentiary standard needed to establish a racial gerrymandering claim. The dissenting justices in *Harris* believed that, in order to prove that racial gerrymandering took place, the plaintiff must present an alternative district map that accomplishes the same political goals without skewed racial composition.[20] However the majority established that such a map is not necessary: credible trial testimony is sufficient, at least in this case. This part of the ruling widened the path to challenges against gerrymandering in general by lowering the bar to prove racial discrimination in redistricting practices.

**The Voting Rights Act, Redistricting, and Precedent**

In the past, the Supreme Court has debated the role of race in elections and woven its way through a timeline of seemingly contradicting decisions, all aimed at answering

the unconstitutionality of race-based gerrymandering. See *Shaw v. Reno*, 509 U.S. 630 (1993). In *Cromartie I*, the Court held that political gerrymandering was not unconstitutional. See *Hunt v. Cromartie,* 532 U.S. 234 (2001).
13 *Cooper v. Harris*, supra note 5, at 1459-1464.
14 *Thornburg v. Gingles*, 478 U. S. 30 (1986).
15 *Cooper v. Harris*, supra note 5, at 1460.
16 *Cooper v. Harris*, *supra* note 5, at 1460-1461.
17 Prior to *Harris*, cases such as *Shaw v. Reno, supra* note 12, *Shaw v. Hunt*, 517 U.S. 899 (1996), *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), were all predicated on the fact that race-based gerrymandering violated rights under the Equal Protection Clause of the Fourteenth Amendment.
18 See generally, *Cooper v. Harris, supra* note 5.
19 *Ibid.*
20 Justice Alito, in his dissent, cited *Easley v. Cromartie*, 532 U.S. 234 (2001), as a precedent to the map requirement. Kagan countered by claiming that though useful, this case does not insinuate that an alternate map is necessary. See *Cooper v. Harris*, *supra* note 5.

the following two questions: What role can race play in redistricting? And how do we protect the Voting Rights Act in gerrymandering cases? The line of precedent used in Harris characterizes the disputes within the Supreme Court on the constitutionality of gerrymandering and the sanctity of the Voting Rights Act.

Considered the most effective piece of civil rights legislation by many,[21] the Voting Rights Act was passed in 1965 to uphold Americans' Fourteenth and Fifteenth Amendment rights: the right to equal protection under the law and the right to vote for all races.[22] Previously, states passed a slew of laws designed to keep Black Americans out of the voting booths. The VRA established several methods of ensuring that minority voters would have proportional voting power. Some of parts of the VRA concern redistricting—perhaps the most controversial way to affect the voting power of communities. Depending on the political/geographic context, minority voters may need to constitute a sizeable minority or even majority in order to have their political interests represented. In other cases, minority interests are represented in crossover districts, so majority-minority demographics are unnecessary. As such, homogeneous racial composition in a given legislative district can either prevent minority voters from being drowned out or dilute the power of their vote. In order to address this nuance, the VRA established federal examiners to review voting policy on a case-by-case basis. Section 5 of the VRA placed historically segregated states under scrutiny by federal regulation.[23] The language of the VRA addressed obstacles keeping minority voters from registering, such as literacy tests and registration taxes. It also opened the door to litigation against minority voter dilution, compelling states to carve up representative districts with equal representation in mind.[24]

The Supreme Court has heard over a dozen related cases which were cited throughout the opinion in *Harris*. Highlighting a few of these landmark cases helps to characterize the court's history on the issue. With this in mind, we turn to one of the recent cases relating to racial gerrymandering: *Shaw v. Hunt* (1996).[25] In this case, two majority Black districts were created by the state, supposedly pursuant to the Voting Rights Act. In other words, the districts were created to avoid minority voter dilution. The more conservative justices, making up the majority, held against the state, restricting its ability to use race in creating district lines. Here, the decision was condemned by civil rights advocates who saw this restriction as an affront to the state's ability to create districts where minority voters had *enough* power.[26] In 1999, the Court heard *Hunt v. Cromartie*, or *Cromartie I*.[27] Here, the conservative majority allowed redistricting that displaced primarily the Black Voting Age Population, so long as political motivations dominated over racial ones. Importantly, this case affirmed that gerrymandering on the basis of political interest was constitutional. Then, in 2001, liberal justices held the majority in *Easley v. Cromartie*,[28] also known as *Cromartie II*. In this case, the Supreme Court handed down an opinion that required more evidence to establish racial gerrymandering. Specifically, in delivering the opinion, Justice Breyer commented that "the primary evidence upon which the District Court relied [in the *Cromartie II*] for its 'race, not politics,' conclusion is evidence of voting registration, not voting behavior; and that is precisely the kind of evidence that we said was inadequate the last time this case was before us."[29] The *Cromartie II* decision was meant to reopen opportunities for redistricting in compliance with the Voting Rights Act by making it more difficult to present racial motivations as predominating. Since then, however, this decision has backfired[30] on its liberal foundations and has been used to pack minorities into crossover districts on a political basis.

Over a decade later, the Court heard *Alabama Legislative Black Caucus v. Alabama* (2015).[31] In this case, the liberal justices held the majority, reacting to what they saw as an abuse of the precedent from the *Cromartie* cases. They set forth a "narrow tailoring" requirement that requires states to provide "a strong basis in evidence" for using the VRA to redistrict with accordance to race. The decisions in Alabama and *Cromartie II* together established the evidentiary requirements foundational to the most recent racial redistricting cases.

In 2016, before *Harris* was decided, the Court heard another racial gerrymandering case: *Bethune Hill v. Virginia Board of Elections*.[32] In this case, the Court decided on a variety of logistic issues in scrutinizing race-based redistricting. The opinion stated that even when redistricting respected traditionally accepted principles of the process, the result can still be race-based discrimination. In making this assessment, the *Bethune Hill* precedent forced courts to take a holistic consideration of the context of the district into account. This holistic assessment requirement captures the undertones of race and politics that contribute to potentially discriminatory acts of redistricting. Thereby *Bethune Hill's* guidelines made it easier for plaintiffs to argue that racial motivations predominated in a state's decision to redraw district lines.

**Moving Forward**

It is on this foundation that the nation's highest court turned its attention to *Cooper v. Harris*. In the majority opinion, Kagan explained plainly that, though claiming to act in compliance with the VRA, the gerrymander actually

21 See, e.g., Office of Congressman Sandy Levin, "Voting Rights," last updated October 1, 2014, accessed February 20, 2018, https://levin.house.gov/issue/voting-rights; The Anti-Defamation League, "The Voting Rights Act," July 27, 2015, accessed February 20, 2018, https://www.adl.org/news/article/the-voting-rights-act; John Lewis, "The Voting Rights Act: Ensuring Dignity and Democracy," *Human Rights Magazine* 32 (2005), https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/spring2005/hr_spring05_act.html; The Department of Justice Civil Rights Division, "Introduction to Federal Voting Rights Laws," last updated June 19, 2009, accessed February 20, 2018, https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0.
22 The Voting Rights Act, 52 U.S.C. § 10101-10304 (1965).
23 While Section 5 has been extended by Congress continuously since the VRA's establishment, the Supreme Court's decision in *Shelby County v. Holder* effectively nullified its enforcement. See generally, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).
24 See the Department of Justice, *supra* note 21.
25 *Shaw v. Hunt, supra* note 17.
26 Linda Greenhouse, "The Supreme Court: The Decision; High Court Voids Race-Based Plans for Redistricting," *The New York Times*, June 14, 1996, http://www.nytimes.com/1996/06/14/us/supreme-court-decision-high-court-voids-race-based-plans-for-redistricting.html
27 *Hunt v. Cromartie, supra* note 12.
28 *Easley v. Cromartie, supra* note 20.
29 *Ibid.*
30 Charles Gregory Warren, "Towards Proportional Representation: The Strange Bedfellows of Racial Gerrymandering and Equal Protection in Easley v. Cromartie," *Mercer Law Review* 53 (2001): 945-966.
31 *Alabama Legislative Black Caucus v. Alabama*, *supra* note 17.
32 *Bethune Hill v. Virginia State Bd. of Election*s, 137 S. Ct. 788 (2017).

worked hard against the principles of the Act.[33] By pushing minority voters away from districts where Republican seats may be uncertain and into historically locked-blue districts, redistricting actively diluted the Black vote—which Kagan saw as a clear violation of Fourteenth Amendment rights. Yet the decision in *Harris* is not simply the next step to the left in this twirling dance between gerrymandering and the Supreme Court. What is most crucial about the majority's decision here is that it married the concept of racial gerrymandering and redistricting for other purposes. Previously, states got away with shifting the demographics of districts by pulling the political gerrymandering or VRA compliance card; now, these reasons always remain suspect if there is evidence that race is a key characteristic. Essentially, if most of the voting age citizens who were redistricted are Black, the constitutionality of the gerrymandering should be, according to Kagan, under question. Furthermore, in stating that an alternate map need not be necessary to prove racial gerrymandering, the Court established a precedent that can be used to challenge the practice of gerrymandering more frequently.

Importantly, when partisanship is increasingly linked to race—such that racial minorities are often Democrats—the Court's limit on racial gerrymandering in *Harris* may functionally pave the way to challenging partisan gerrymandering. Since political motivations are often used as a scapegoat for racial ones, it becomes harder to determine when a district is drawn that suppresses minority rights—and when it is a constitutional act of political gerrymandering. *Cooper v. Harris* opens up more possibilities for challenging redistricting that would otherwise be swept away as constitutional. In doing so, it paves the way for this year's much-anticipated *Gill v. Whitford* case, which challenges the notion of gerrymandering entirely.[34] In this case, the Court will surely turn to the precedent set in *Harris*, though the racial component of the *Harris* precedent is less salient in *Whitford*. *Harris* will still be important in the decision of *Whitford*, because it has altered the framing courts use to think about the intersection of discrimination and gerrymandering. The *Harris* opinion applies precedent to widen the range of possible cases wherein the court may determine that adverse effects are primarily race-based. Thereby it increases the possibility for cases which are not explicitly framed as such to be read as unconstitutional. In other words, I argue that a faithful application of the precedent in *Harris* would require courts to accept challenges to districting that, while perhaps drawn for the purpose of partisan benefit, functionally gerrymander on the lines of race.

On whole, *Harris*'s precedent pushes the issues of voting rights and fair representation into the foreground of all future gerrymandering cases. As such, voting rights advocates who seek to abolish political gerrymandering now have more room to make the case that political gerrymandering—when laid onto the context of American politics today—may be unconstitutional. *Cooper v. Harris* is a case not only intertwined with important civil rights history, but it is a decision that could serve as a crucial turning point towards a new era in American politics, starting with the upcoming *Gill v. Whitford* case. If the Supreme Court embraces the precedent set in *Harris*, then the future of gerrymandering may already be determined. Whatever the outcome moving forward, *Harris* will surely alter how democracy is drawn up in America.

33 *Cooper v. Harris, supra* note 5..
34 Adam Liptak, "When Does Political Gerrymandering Cross a Constitutional Line?", *The New York Times*, May 15, 2017, https://www.nytimes.com/2017/05/15/us/politics/when-does-political-gerrymandering-cross-a-constitutional-line.html.

# Understanding Our Federalism

Isaac Cui (PO '20)
Senior Editor

## I. Introduction

Federalism is the division of power between levels of government. Though covered in every Civics 101 class, federalism is not a topic that is naturally compelling for most. And when juxtaposed with hot-button issues such as abortion, free speech, same-sex marriage, race- or sex-based discrimination, or the death penalty, federalism seems auxiliary at best and distracting at worst. However, as Professor Young put it, that notion is "so tragically wrongheaded"[1] that it needs to be challenged. Federalism is not some vestige of an outdated constitution. It's also not just an excuse for those who favor entrenched inequality.[2] Rather, federalism is the staging ground for all political conflicts. Moreover, it's a critical accommodation for the incredible amount of diversity in the United States because it diffuses authority and creates different jurisdictions, fostering policy responsiveness to different constituencies. As society becomes more heterogeneous, I argue, federalism will only become more important.

This essay has three goals. First, it attempts to explain Our Federalism—to characterize what modern federalism looks like. Second, it tries to sell Our Federalism—to show that Our Federalism really matters. Third, it seeks to situate Our Federalism in current Supreme Court doctrine and to suggest avenues of doctrinal evolution. The essay will be published in two parts. In this first part, I define different models of federalism and introduce the concept of Our Federalism. The second part, published online, defends Our Federalism.

## II. Our Federalism, Defined

This section discusses three models of federalism: Conventional Federalism, Your Father's Federalism, and Our Federalism. These models provide a vocabulary for understanding what the division of power between levels of government looks like; each is therefore both descriptive of a certain distribution of power and idealized, in that none holistically captures the entire state of affairs.

### *A. Conventional Federalism*

When people speak of "federalism," they usually refer to what I call "Conventional Federalism." This is the idea that, according to Justice O'Connor, "every schoolchild learns" about—the idea that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[3] Under this model, the federal and state governments are distinct, and each has an "exclusive realm[]" of authority "protected from mutual incursion by a clearly defined boundary."[4] In other words, Conventional Federalism understands state and federal regulatory domains to be completely separate. That separation, according to the Supreme Court, arises from the "'inviolable sovereignty'... reserved explicitly to the States by the Tenth Amendment."[5]

This model of federalism derives from the structure of the Constitution, according to the Supreme Court. In one opinion, the Court observed that the Constitution gives the federal government "not all governmental powers, but only discrete, enumerated ones."[6] The implication is that the federal government is limited because its powers are listed. In contrast, the states are accorded any power not prohibited by the Constitution, according to the Tenth Amendment. In the Conventional Federalism model, the general authority afforded to states—called a "police power"—is juxtaposed with the limited powers delegated to the federal government. The Court has stated that the Constitution "incontestabl[y]"[7] creates such a system,[8] and, because that system derives from the Constitution, courts have the duty to police those boundaries between the federal and state governments.[9]

### *B. Your Father's Federalism*

Federalism also has a different connotation—of segregation, slavery, racism. This understanding of federalism—what Dean Heather Gerken calls "Your Father's Federalism"[10] —sees federalism as oppositional to progress and equality. Scholars who decry Your Father's Federalism note how the discourse of "states' rights" was used to oppose abolitionist demands in the pre-Civil War era or to prevent desegregation during the Civil Rights Era, for example. Accordingly, such scholars see little value in granting states power; their preference for the national government is why they are sometimes known as "nationalists."[11]

1 Ernest A. Young, "Federalism as a Constitutional Principle," *University of Cincinnati Law Review* 83 (2015): 1057-1082, at 1057.
2 Although federalism has been deployed to service such political ends, such as in opposition to the Civil Rights Movement. See Section II.B: Your Father's Federalism.
3 *Gregory v. Ashcroft*, 501 U.S. 452 (1991), at 457.
4 Erin Ryan, "Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area," *Maryland Law Review* 66, no. 3 (2007): 503-667, at 541.
5 *New York v. United States*, 505 U.S. 144 (1992), at 188 (internal citations omitted).
6 *Printz v. United States*, 521 U.S. 898 (1997), at 919.
7 *Id.* at 918.
8 In other literature, this is termed constitutional federalism. See, *e.g.*, John O. McGinnis, "Constitutional Federalism v. National Federalism," *Law and Liberty*, November 17, 2017, https://tinyurl.com/yco5yj8z; or Abbe R. Gluck, "Federalism From Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble," *Fordham Law Review* 81 (2013): 1749-1775, at 1753 ("'Constitutional' federalism is typically a federalism defined by the allocation of powers in our founding document and one that has been understood by many to prescribe separate spheres of state and federal responsibility and to have as its goal the preservation of state autonomy") [hereinafter Gluck, "Federalism From Federal Statutes"]. It is also sometimes known as "strict separationist federalism." See generally Ryan, *supra* note 4.
9 See, *e.g., NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), at 2579-80 (stating that "there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits").
10 Heather K. Gerken, "The Loyal Opposition," *Yale Law Journal* 123 (2014): 1958-94, at 1963-64.
11 See, for example, *id.* at 1963 (noting that "[s]tate sovereignty looms large when-

While it's certainly true that states' rights have been invoked in such ways, they have also been used for the exact opposite demand. For example, in the early days of the republic, abolitionists argued that fugitive slave laws were unconstitutional acts of federal overreach, and pro-slavery interests pushed for a stronger federal government to enforce those laws.[12] Similarly, many contemporary progressives and liberals are utilizing the mantle of federalism to protect against national policies enacted by the Trump Administration.[13] The point here is that while history may give federalism a bad name, it is difficult to see how federalism might be intrinsically tied to any specific political end. Instead, this essay conceives of federalism as a tool that can be used for any end.

### *C. Our Federalism*

I argue that contemporary federalism is best understood by what Dean Gerken calls "Our Federalism."[14] This section lays out three basic aspects of the model. First, in Our Federalism, the balance of power between levels of government is driven by Congress, not by courts enforcing constitutional limits on the federal government. Second, Our Federalism views the division of power as "all the way down"[15]—that is, it conceptualizes American governance as occurring not just through the federal and state governments but also through cities, juries, bureaucracies, and any other number of institutions. Third, Our Federalism is not Your Father's Federalism.

#### 1. Congress, Not the Courts

Our Federalism is driven by statutes, not judges. Modern laws are often drafted to have a role for states; as one prominent scholar describes it, a "very great deal of state sovereign power" derives from "federal statutory implementation."[16] I give two examples to illustrate this: the Clean Air Act and the Affordable Care Act.

Under the Clean Air Act, the Environmental Protection Agency (EPA) creates regulations on how much pollution should be in the air but leaves it up to states to formulate "state implementation plans" which describe how they will meet federal emissions targets.[17] Importantly, the federal government was not required to build in such a robust role for states. The federal government could have simply had EPA regulate for the entire nation—and indeed, the statute even specifies that if states refuse to draw up state implementation plans, EPA will take over regulatory command.[18] Under conditions of a federal takeover, states would no longer be allowed to regulate; in legal parlance, state authority would be "preempted"[19] by the federal government in such situations.

Preemption was not a huge worry for states, however. When states refused to abide by EPA's standards, EPA never took over because the federal government lacked the resources to do so. This is generally the case when it comes to such large and complex regulatory schemes; hence, states have a "trump card" in dealing with the federal government—they're "indispensab[le]"[20] to regulations.

On the flip-side of refusing to implement federal law, states have also blazed the trail on regulations, pushing further than federal requirements. Before the inception of the Clean Air Act, California had already begun regulating air pollution. Hence, Congress had EPA grant California a waiver from the Clean Air Act's preemption provision which barred states from adopting their own vehicle emission standards. California's standards were ultimately higher than EPA's baseline, and the result was that many other states—and eventually even EPA—would adopt California's standards.[21]

Another example is the Affordable Care Act (ACA)'s[22] Medicaid expansion. Medicaid, when enacted in 1965, provided federal funding to the states to help children, needy families, the blind, the elderly, the disabled, and the pregnant to obtain healthcare. The federal government established specific standards for how states could use that money but in general left implementation details to the prerogative of the states. Under the ACA's Medicaid expansion, states were required to provide coverage to adults with incomes up to 133 percent of the federal poverty line; the law also increased federal funding to cover part of the costs of this expansion. The ACA mandated that states which did not expand their coverage to the ACA's levels would have their previous Medicaid funding cut.[23]

This use of states as implementers of a complex federal regulatory scheme is "paradigmatic 'cooperative federalism'"[24]—Congress specifically carved out a space for states to experiment and to achieve the national policy goal of providing healthcare to the needy. This was an explicit choice on Congress' part, just like with the Clean Air Act. In addition to the role given to states in the Medicaid expansion, the ACA also created new insurance exchanged markets which gave powers to the states. Indeed, what differentiated the House and Senate versions of the ACA was the question of whether those new exchanges should be centralized in the federal government or whether states should have the ability to administer them. The ACA's final result—states leading in administration with optional federal takeover—resulted from the Senate, which argued for its position out of feder-

ever nationalists discuss federalism, with many viewing federalism as a code word for letting racists be racists"); id., at 1967 (on how racism is associated with federalism in the past); and Akhil Reed Amar, "Five Views of Federalism: 'Converse-1983' in Context," *Vanderbilt Law Review* 47 (1994): 1229-49, at 1231-32 (on the Nationalist Perspective of Federalism) [hereinafter Amar, "Five Views of Federalism"].

12 Ryan, *supra* note 4, at 598-99.

13 See, *e.g.*, Heather Gerken, "We're about to see states' rights used defensively against Trump," *Vox*, January 20, 2017, accessed February 28, 2018, https://tinyurl.com/yat7cvp5.

14 Gerken, "The Loyal Opposition," *supra* note 10, at 1963-64.

15 *Id.* at 1963.

16 Abbe R. Gluck, "Our [National] Federalism," *Yale Law Journal* 123 (2014): 1996-2043, at 1997 (italics original).

17 Young, "Federalism as a Constitutional Principle," *supra* note 1, at 1074.

18 Jessica Bulman-Pozen and Heather K. Gerken, "Uncooperative Federalism," *Yale Law Journal* 118 (2009): 1256-1310, at 1276. See also 42 U.S.C. §§ 7410(c)(1) (specifically providing that the EPA Administrator "shall promulgate a Federal implementation plan" if the EPA Administrator "finds that a State has failed to make a required submission . . . .").

19 Preemption is a legal doctrine deriving from the Supremacy Clause, U.S. Const. Art. VI, § 2, which states that "the Laws of the United States . . . shall be the supreme Law of the Land." Under this doctrine, when federal and state law conflict, federal law prevails. In this example, if EPA preempts a state's regulatory authority, then that state would no longer be allowed to regulate; EPA would have exclusive authority over air pollution regulation.

20 Bulman-Pozen and Gerken, *supra* note 18, at 1276 (the second quote is from John Dwyer, then a law professor at U.C. Berkeley).

21 *Id.* at 1276-77; see also Gluck, "Our [National] Federalism," *supra* note 16, at 1756, note 23.

22 The ACA is more popularly known as Obamacare.

23 *NFIB v. Sebelius, supra* note 9, at 2581-82 (opinion of Roberts, C.J.). The Medicaid expansion was challenged in *NFIB*, which is discussed later in this section.

24 Gluck, "Federalism From Federal Statutes," *supra* note 8, at 1750.

alism concerns.[25] The role of states therefore did not come from excluding the federal government and protecting the states' inviolable sovereignty, as per the Conventional Federalism model. Rather, states played a vigorous role because they were implementing federal law.[26] As a model, Conventional Federalism simply wouldn't recognize these statutory schemes as forms of federalism—even though these frameworks were defining how the states and the federal government interact in their respective regulatory areas.

There are three other takeaways from these examples. First, the federal government's regulatory domain was never in question. Take the example of the ACA. When the 1965 Congress wanted to expand the social security net, conservative Republicans and Southern Democrats were worried about federal encroachment into the area of healthcare. Prior to this, some states ran charities which provided healthcare to the "deserving" poor. Progressives therefore enacted a dual program of reform: a fully nationalized system would focus on a particularly sympathetic group—the elderly—while the federally-funded but state-administered program was to be thought of as "an extension of prior state charity-care efforts, rather than as a major reform of them."[27] These would respectively become Medicare and Medicaid when Congress enacted the Social Security Act of 1965. The worry that led to the creation of Medicare and Medicaid was a political one, not a legal one; Congress' authority was never in doubt, even if the wisdom of creating a national healthcare system was.

Even the major constitutional challenge to the ACA never functionally contested whether the federal government could regulate healthcare.[28] In *NFIB v. Sebelius*, two provisions of the ACA were contested: the aforementioned Medicaid expansion and the individual mandate, the requirement that all individuals have health insurance with a minimum level of coverage.[29] The challenge to the individual mandate argued that it exceeded Congress' authority under the Commerce Clause.[30] The unsigned dissent, jointly authored by Justices Scalia, Kennedy, Thomas, and Alito, along with the opinion of the Chief Justice, agreed with the challengers. However, a different majority—the Chief Justice, along with Justices Ginsburg, Sotomayor, Kagan, and Breyer—believed either that the individual mandate was constitutional under the Commerce Clause or that it could be construed as a tax pursuant to Congress' taxing powers.[31] The individual mandate therefore survived the lawsuit.

The Medicaid expansion was similarly fragmented. Only two Justices—Ginsburg and Sotomayor—would have upheld the Medicaid expansion in its entirety against the Tenth Amendment challenge. The other seven justices thought that the expansion was unconstitutionally coercive due to the threat of withholding previous Medicaid funding. This bloc splintered in regards to the appropriate remedy, however; the unsigned dissent thought that the entire ACA should have been struck down, whereas three justices (the Chief Justice, along with Justices Breyer and Kagan) thought the threat of withholding funds could be severed from the operation of the rest of the Act. To sum up: the threat of withholding federal funds was struck down but the rest of the ACA survived.[32]

The upshot is that even when the Supreme Court struck down an aspect of the ACA on federalism grounds, the Court never meaningfully challenged the overall regulatory authority of Congress. The only aspect of the decision which came close to limiting Congress' authority was when five justices stated that the individual mandate could not be construed as an exercise of Congress's Commerce Clause powers—but this threat was without teeth given that the Court provided Congress with the loophole of construing the mandate as a tax.[33]

The second takeaway from the ACA and Clean Air Act examples is that federalism concerns permeate the political process. As noted earlier, the Medicaid expansion utilized state-based implementation precisely because Congress wanted to protect state interests and to promote experimentation.[34] Similarly, when dealing with air pollution, Congress thought that a uniform, national regulation wouldn't suffice—hence, they built decentralization into the mechanism of the Clean Air Act, leveraging the states to promote policy innovation.[35] The division of power between states and the federal government was hence determined by Congress, not the courts, in each of these examples. Thus, while Conventional Federalism sees the division between the states and federal government to be static and policed by courts, Our Federalism is dynamic: "[w]ith almost every national statutory step, Congress gives states new governing opportunities or incorporates aspects of state law—displacing state authority with one hand and giving it back with the other."[36]

2. Federalism All the Way Down

Our Federalism understands federalism to be "all the way down."[37] Though we traditionally think of federalism as the division between states and the federal government, political life in the United States is much more diffuse. From city councils to zoning commissions, juries to state legislatures, American political life is incredibly decentralized. And while this is not a unique structural aspect of Our Federalism, it's an important way to frame our understanding of federalism because it forces us to recognize how the conflictual dynamics that exist between the states and the federal government also exist at smaller levels.

Take, for example, the contemporary debate over sanctuary cities—cities that do not voluntarily enforce aspects of federal immigration law—in Texas. While Texas' state-wide

25 *Id.* at 1757.
26 *Ibid.*
27 *Id.* at 1762.
28 The ACA was also challenged in another major case, but that was along statutory lines. The entire question hinged on the meaning of a certain operative phrase in the statute—not on the constitutionality of the Act itself. See *King v. Burwell*, 135 S. Ct. 475 (2015).
29 NFIB, *supra* note 9, at 2577.
30 U.S. Const. Art. I, § 8 cl. 3 (Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
31 U.S. Const. Art. I, § 8 cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").
32 This result is because a majority of the Court ended up believing that the threat of revoking funds could be severed from the rest of the Act.
33 See generally, *NFIB v. Sebelius, supra* note 9.
34 Gluck, "Federalism From Federal Statutes," *supra* note 8, at 1758.
35 Young, "Federalism as a Constitutional Principle," *supra* note 1, at 1062.
36 Gluck, "Our [National] Federalism," *supra* note 16, at 1997.
37 Gerken, "The Loyal Opposition," *supra* note 10, at 1963.

government might favor restrictionist policies towards immigrants, cities such as Austin or San Antonio are much more integrationist. Thus, Austin declared itself a sanctuary city and Texas, in response, banned such policies. The ensuing legal and political battle reflects the federalism struggles between the states and the federal government are mirrored by lower tiers of government.[38] One law professor has dubbed this phenomenon the "fractal complexity of federal-state relations."[39]

3. Not Your Father's Federalism

Our Federalism, in the words of Dean Gerken, "should not be conflated with your father's federalism."[40] While in previous eras, states could resist federal attempts at promoting diversity through appeals to state sovereignty, that sovereignty—understood as a zone of exclusive state regulation—no longer exists in practice. In other words, that "trump card wielded during the days of slavery and Jim Crow cannot be played anymore. If the national government wants to find a way to regulate states, it can."[41] This is not to say that no barriers exist to national regulation; as noted earlier, there are certainly political ramifications to the expansion of the national government. For example, political scientists have found that the passage of the ACA, which markedly expanded the federal government's regulatory reach, significantly harmed the Democrats in the 2010 midterm elections.[42] Instead, the point is that Our Federalism is not Your Father's Federalism because national regulation is basically always constitutionally permissible—that is, courts likely will not block Congress when it expands federal regulations.

*D. Our Federalism—Descriptions and Prescriptions*

I noted earlier that all of these models are both descriptive and idealized in some way. Our Federalism points to fundamental truths about contemporary American government: that state power is often a function of statutes rather than inviolable regulatory domains, and that governance decisions are made by people ranging from federal legislators to city bureaucrats and everyone in between. Our Federalism provides that vocabulary for understanding the political nature of federalism—how politics, rather than constitutional law, so powerfully shapes what contemporary federalism looks like.

Our Federalism, as a model, also holds certain ideals as desirable. It strikes a middle ground between the so-called nationalists and federalists[43] by recognizing that the federal government should have broad authority, but that states, cities, and every other institution have an important role to play in government. That scheme—where the federal government has few limits on its regulatory authority but states have powerful roles to play in federal regulations—is the heart of Our Federalism. It is what makes Our Federalism such a lucrative compromise between Conventional Federalists, who seek to have autonomous and sovereign states, and those who oppose Your Father's Federalism, who essentially see any autonomy for states as dangerous due to federalism's ugly history. Our Federalism balances a supreme national government with powerful states and decentralized authority, going all the way down to the city bureaucrat.

The next part of this essay, published online at www.5clpp.com, defends Our Federalism.

38 See, *e.g.*, Patrick Svitek, "Texas Gov. Greg Abbott signs 'sanctuary cities' bill into law," *Texas Tribune,* May 7, 2017, http://bit.ly/2pqPuna (detailing Texas' Senate Bill 4 which requires state law enforcement to cooperate with federal immigration enforcement officers, including honoring detaining quests to hold noncitizen inmates subject to deportation; note that SB 4 was called for by the Governor explicitly in response to Travis County Sheriff Sally Hernandez's announcement that her officers would decrease cooperation with federal immigration officials); Stephanie Federico, "City of Austin Joins San Antonio In Lawsuit Against 'Sanctuary Cities' Law," *KUT*, June 1, 2017, http://bit.ly/2l0UwGJ (covering resistance to SB 4 by Austin, San Antonio, El Paso, and El Cenizo); and Paul J. Weber, "Court: Texas can enforce more of 'sanctuary cities' law," *Chicago Tribune*, September 25, 2017, accessed December 26, 2017, http://trib.in/2BUhJ81 (explaining the Court of Appeals for the Fifth Circuit's ruling reversing the District Court injunction on SB 4's implementation).

39 Edward L. Rubin, "Federalism as a Problem of Governance, Not of Doctrinal Warfare," *Saint Louis University Law Journal* 59 (2015): 1117-31, at 1118.

40 Gerken, "The Loyal Opposition," *supra* note 10, at 1963.

41 *Ibid.*

42 See, generally, Brendan Nyhan, Eric McGhee, John Sides, Seth Masket, and Steven Greene, "One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election," *American Politics Research* 40(5): 844-79.

43 See, generally, Heather K. Gerken, "Federalism and Nationalism: Time For A Détente?" *Saint Louis University Law Journal* 59, no. 4 (2015): 997-1044.

# Exploring Federal Drug Sentences: The Case for Mandatory Minimum Reform

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Mandatory minimums force a judge to enforce a minimum prison sentence based on specific charges brought against a defendant, giving a prosecutor more power in deciding the severity of the sentence than is customary in criminal cases.[1] Currently, mandatory minimums can be overruled in two cases: if the defendant cooperates with the government by providing critical information or if the offense in question is nonviolent and the defendant meets specific criteria.[2] Sentencing guidelines are a similar but preferable alternative that are sometimes used in place of mandatory minimums. Sentencing guidelines give ranges of time, such as 18-24 months, to be sentenced for a given crime.[3] Both mandatory minimums and suggested sentences are used for crimes that are considered by the federal government to be societally agreed upon moral ills, including illegal firearm possession, child sexual exploitation, identity theft, and drug charges. Marijuana-related mandatory minimums are particularly contentious and outdated, as these federal regulations are increasingly challenged by individual states' legalization of cannabis. The weight of evidence is thus in favor of sentencing reform.

Currently, many Americans oppose mandatory minimums, and legislative action is being taken in an attempt to limit their use or make them obsolete.[4] This year, the federal legislature will vote on the Sentencing Reforms and Corrections Act, a bill introduced in 2017 that aims to alleviate the harms of mandatory minimums. I argue that mandatory minimums unjustly propel an antiquated drug war and should be reduced in 2018 with reforms including passage of the Sentencing Reforms and Corrections Act. Specifically, mandatory minimums are increasingly arbitrary and harmful in marijuana cases, where individual states have legalized the substance yet the federal government still enforces mandatory minimums for possessing certain amounts. This pattern, and the current administration's stark opposition towards reform, further proves its lack of touch with state governments and the American people.

Congress has used mandatory minimums since the Crimes Act of 1790, when the death penalty was prescribed as mandatory for treason, murder, piracy, or rescue of a person convicted of a capital offense.[5] Up through the 1970s, however, these minimums were rare, and judges had nearly complete sentencing power. Lack of federal guidelines for sentencing led to wide deviations, and courts were criticized for their inconsistency.[6] In 1984, the Sentencing Reform Act established the US Sentencing Commission, and introduced the idea of "sentencing guidelines."[7] The most apparent and abhorred enforcement of mandatory minimums that continues to drive the policy today came in 1986, with the Anti-Drug Abuse Act.[8] The Act states that

> In the case of a violation of subsection (a) of this section involving—…1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury resulted from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual.[9]

The Act was particularly decried for its distinction between powder and crack cocaine. It prescribed harsher sentences and stricter amount policies — by a ratio of 100:1 — for crack cocaine, which is more likely to be used in less affluent minority neighborhoods.[10] The grave impacts of the Anti-Drug Abuse Act are statistically clear: since 1991, mandatory minimums have doubled.[11]

The morally conscious argument in favor of mandatory minimums posits that they reflect a societal judgment that certain crimes are so heinous that they demand specific punishment. Proponents of this argument believe that the American people should trust legislators to make that judgment.[12] If people are punished according to the federally understood morality of their crime, punishments and sentences will become standardized, reducing inconsistency among courts.[13] Currently, punishments are decided by juries, reflecting local standards which can vary greatly state-to-state. Under the current system, the same exact crime can receive drastically different sentences, even in the same court. Federal mandatory sentences eliminate this possibil-

1 "Mandatory Minimums and Sentencing Reform," Criminal Justice Policy Foundation, accessed March 7, 2018, https://www.cjpf.org/mandatory-minimums/.
2 Paul Larkin and Evan Bernick, "Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms," The Heritage Foundation, last modified February 10, 2014, accessed March 7, 2018, https://www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against.
3 "Mandatory sentencing was once America's law-and-order panacea. Here's why it's not working." [Families Against Mandatory Minimums], Prison Policy, accessed March 7, 2018, https://www.prisonpolicy.org/scans/famm/Primer.pdf.
4 Amelia Thomson-DeVeaux, "Jeff Sessions Is Trying To Take Criminal Justice Back To The 1990s," FiveThirtyEight, February 7, 2018, accessed March 7, 2018, https://fivethirtyeight.com/features/jeff-sessions-is-trying-to-take-criminal-justice-back-to-the-1990s/.
5 U.S. Sentencing Commission, History of Mandatory Minimum Penalties and Statutory Relief Mechanisms, H.R. Doc. (2011). Accessed March 7, 2018.
6 Larkin and Bernick, "Reconsidering Mandatory," The Heritage Foundation.
7 *Ibid.*
8 *Ibid.*
9 Anti-Drug Abuse Act of 1986, H.R. 5484, 99th. (1986). Accessed March 7, 2018. https://www.govtrack.us/congress/bills/99/hr5484/text.
10 American Civil Liberties Union, Cracks in the System: Twenty Years of Unjust Federal Crack Cocaine Law, by Deborah Vagins Policy Counsel for Civil Rights and Civil Liberties and Jesselyn McCurdy Legislative Counsel, i, October 2006, accessed March 7, 2018, https://www.aclu.org/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf.
11 Larkin and Bernick, "Reconsidering Mandatory," The Heritage Foundation.
12 *Ibid.*
13 *Ibid.*

ity and assign clear moral criminality to offenses, effectively reducing the chances of unfair sentencing and keeping judicial power in check.

Another more practical argument supporting mandatory minimums suggests that these sentences will have a deterrent effect on criminals and ultimately prevent crime.[14] Theoretically, mandatory minimums also have the potential to assist the government in taking down large drug operations, as they both weaken the operation by imprisoning people who sell and promulgate drugs and use information from low-level drug offenders to help take down larger drug chains. Supporters of mandatory minimums maintain that fewer drug dealers on the street for less time will result in fewer drug crimes. Furthermore, an important loophole allowing many mandatory minimums to be avoided allows those willing to rat out their criminal superiors the opportunity to reduce their sentence. This path, often preferable to defendants in the face of many years in jail, facilitates law enforcement in their investigation of large drug operations. Finally, the harshness and consistency of the sentences have the potential to deter citizens from breaking the law, which is ostensibly a relatively liberal, reform-guided justification for punishment. These arguments are compelling, as there is substantial evidence to support the notion that mandatory minimums might prevent crime. The U.S. Sentencing commission reported in 2017 that drug traffickers convicted of an offense and sentenced with a mandatory minimum had a lower recidivism rate than those without mandatory minimums. This number, however, could be due to an older age at release, reducing the likelihood of reentering a life of crime.[15]

On the other hand, there is significant evidence that mandatory minimum laws should be reformed. Primarily, mandatory minimums lead to disproportionate sentencing in what is known as the "cliff effect." Because mandatory minimums are attached to specific amounts of a drug, minuscule discrepancies in drug amounts can result in sentence differences that are so large the drop off resembles a cliff. For example, someone found in possession of .9 grams of LSD might spend very little to no time incarcerated whereas someone found in possession of 1 gram could face up to five years incarcerated. Federal drug cases are regarded as conspiracies, meaning their sentences are based on the total weight of drugs in any transaction, and so the defendant's role in the case is not considered in mandatory minimum sentencing. Low-level co-conspirators in drug operations can therefore be legally responsible for the same offenses as the kingpin, simply because the amount of drugs they handled was the same.[16] For example, if someone had one pound of cocaine only with the intent of selling it in small batches over a long period of time, they would face the same punishment as someone who engineered the shipping and distribution of the same amount. Non-drug ingredients are also not accounted for in the weight of drugs during prosecution. Moreover, through the mandatory minimum system, low-level drug handlers might end up with longer sentences than their higher-ups because they have less information to share with the government and cannot cooperate as easily.[17] Because this system rewards the offering of information to the government, mandatory minimums incentivize lying, causing some people to unnecessarily plead guilty in order to avoid long sentences.[18]

In addition to drug amounts, mandatory minimums also produce sentences disproportionate to drug severity. There are similar sentencing laws for marijuana and opiate offenses, even though these drugs have extremely different addiction rates and correlations to increased criminal activity.[19] Similarly, mandatory minimums ensure that judges cannot consider the facts or extenuating circumstances of a specific case, losing all conception of context in delivering a drug sentence.[20] These laws also give prosecutors unprecedented power in court, as they can decide which charges to bring based on the sentence attached to them. Prosecutors are not trained in sentencing and have no incentive to sentence justly.[21] Allowing the government, through prosecuting lawyers, to dictate how long a criminal defendant convicted of drug offenses stays in prison effectively removes checks and balances between the judicial and executive branches of government.

Finally, the idea that mandatory minimums promote uniform sentencing has been proven not altogether true. As a result of loopholes in the laws, sentences continue to vary according to demographics and characteristics. In general, women receive shorter sentences, and black and Hispanic offenders receive longer, more severe punishments than their white counterparts.[22] In Fiscal Year 2016, Hispanic offenders made up 40.4 percent of those who received mandatory minimum sentences, while black offenders made up 29.7 percent, white offenders made up 27.2 percent, and other ethnicities received 2.7 percent of mandatory minimum sentences.[23] Black and Hispanic men make up a disproportionate number of those incarcerated, and mandatory minimum sentences serve to increase their time spent in prison. In Fiscal Year 2015, the average cost of yearly incarceration of a prisoner was $32,000.[24] The federal prison budget was $7 billion in 2017.[25] In this way, mandatory minimums are wasteful, as keeping too many people unnecessarily incarcerated is a strain on the federal budget, and mandatory minimum laws greatly increase the average sentence time for a drug crime.[26]

There is a wealth of evidence indicating that mandatory minimums still have widespread impacts on the criminal

14 *Ibid.*
15 United States Sentencing Commission, Mandatory Minimum Penalties for Drug Offenses (Government Printing Office, n.d.),10, accessed March 7, 2018, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf.
16 Larkin and Bernick, "Reconsidering Mandatory," The Heritage Foundation.
17 Christopher Ingram, "Senators held a hearing to remind you that 'good people don't smoke marijuana' (yes, really)," The Washington Post, April 5, 2016, accessed March 7, 2018, https://www.washingtonpost.com/news/wonk/wp/2016/04/05/senators-one-sided-marijuana-hearing-is-heavy-on-anecdote-light-on-data/?utm_term=.0979a6b48c70.
18 Jeffrey Bellin, "Waiting for Justice," The Marshall Project (New York, NY), February 7, 2018, accessed March 7, 2018, https://www.themarshallproject.org/2018/02/07/waiting-for-justice.
19 Meierhoefer, B. S., "The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed" (Washington DC: Federal Judicial Center, 1992), p. 25.
20 Anti-Drug Abuse Act of 1986, H.R. 5484, 99th. (1986). Accessed March 7, 2018. https://www.govtrack.us/congress/bills/99/hr5484/text.
21 Larkin and Bernick, "Reconsidering Mandatory," The Heritage Foundation.
22 Meirhoefer, "The General Effect," 25.
23 US Sentencing Commission, Mandatory Minimum Penalties: Quick Facts (Government Printing Office, 2016),1, accessed March 7, 2018, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY16.pdf.
24 "Mandatory Minimums," Criminal Justice Policy Foundation.
25 *Ibid.*
26 *Ibid.*

justice system and that reforms should be enacted. In Fiscal Year 2016, while only 13.4 percent of all federal offenders were mandatory minimum offenders, 61.3 percent of those convicted of offenses that are attached to mandatory minimums did not receive relief from their sentences. In the same year, 67.3 percent of mandatory minimum sentences were drug trafficking offenses. In 62.7 percent of powder cocaine cases and 27.8 percent of marijuana cases, defendants were unable to evade mandatory minimums through loopholes or more relaxed regulations, and the sentences were applied. A 2017 US Sentencing Commission report states that its key findings prove that mandatory minimums result in long sentences and have significant impacts on the prison population.

In recent years, moderate reforms and updates to mandatory minimum laws have been put into place. What is colloquially known as the "safety valve provision" was an October 1993 bill intended to ameliorate unfair targeting of low-level drug trafficking offenders. The bill permitted offenders to avoid mandatory minimums if the defendant had one criminal history point that met certain criteria. These criteria included that the offense did not result in death or serious bodily injury, that the defendant did not carry or possess a firearm or dangerous weapon during the offense, that they did not play a leadership role in the drug operation, and that did not attempt to use physical force against another person in the course of the offense.[27] A 2017 US Sentencing Commission report shows that statutory safety value provision has not fully ameliorated the impact of mandatory minimums of low-level drug offenders.[28]

Despite the prevalence of mandatory minimum sentencing, marijuana selling, distribution, and usage has increased in the past decade.[29] The relationship between marijuana usage and the federal government has become increasingly contentious as states begin to legalize the substance. The 2013 Controlled Substance Act, which Jeff Sessions views as illegal, declared that federally prosecuting marijuana cases was not a priority, and effectively allowing states to legalize it. In 2005, the Supreme Court case *US v. Booker* ruled that the previous sentencing guidelines are advisory, not mandatory, but that statutory mandatory minimums — which usually involve large amounts of marijuana such as 1000 kg or 1000 plants — still remain in effect.[30] In the same year, another case, *Gonzales v. Raich*, decided that the federal government is constitutionally permitted to prohibit marijuana for all purposes, effectively leaving it up to the federal government's discretion whether or not to prosecute crimes involving the drug.[31] Under the federal scheduling system, marijuana is a schedule 1 drug, meaning it has no medical value and has a high potential for abuse. [32] Federal law dictates that "1,000 or more marihuana plants…shall be sentenced to a term of imprisonment which may not be less than 10 years."[33] The current presidential administration supports the sentiments of these federal mandatory minimums. In 2016, Jeff Sessions warned the Senate that marijuana is a "very real danger" and concluded that "good people don't smoke marijuana."[34]

A recent case where federal mandatory minimums for marijuana clearly distorted the court process is that of Joseph Tigano III's trial. Tigano was arrested for possession of 1400 marijuana plants. Because of the high sentence mandated for his crime, Tigano's lawyers delayed his trial for seven years in hopes that he would agree to a plea deal rather than go to court and receive a mandatory minimum sentence.[35]

In October 2017, senators introduced the Sentencing Reform and Corrections Act. This bill, which reduces mandatory minimums for non-violent repeat drug offenders and eliminates the three strike mandatory life provision, is very similar to a 2015 bill that was struck down. The three-strike mandatory life provision is an existing mandatory sentencing law stating that after three convicted drug offenses, life in prison is mandatory. There are other similar acts up for congressional approval in 2018 that promote reforms such as corrections oversight, recidivism reduction, and eliminating costs related to the criminal justice system for taxpayers in our national system.[36] One act forces the Department of Justice to reduce recidivism rates, calls for low-risk inmates to be put in less restrictive conditions, allows for a resource shift to better fund law enforcement efforts, and requires the federal probation office to plan for prisoner re-entry.[37] These bills have popular support, and polls show that most Americans think that mandatory minimums are unjust and should be overturned.[38] Despite this support, these bills are facing a lot of backlash from the current administration. On February 12, 2018, Jeff Sessions proudly declared to the National Sheriffs' Association: "I cannot and will not pretend that a duly enacted law of this country — like the federal ban on marijuana — does not exist. Marijuana is illegal in the United States — even in Colorado, California, and everywhere else in America."[39] The criminal justice system continues to face distortion as a result of mandatory minimum sentencing. These sentences remove judges' power, reduce nuanced crimes to numbers, and unfairly reward the disclosing of information, incentivizing lying and favoring high-up drug criminals. While a majority of the American people have stated opposition to mandatory minimum laws, the current presidential administration has promulgated much stricter action against drug crimes, including the increased usage of federal mandatory sentences. This resistance signals not only the increasing separation between the goals of the administration and the views of modern Americans, but also its general lack of will or interest in creating a more fair justice system.

In order to alleviate the injustice of mandatory minimum laws, the United States must pass laws, specifically the Sentencing Reform and Corrections Act, that allow history, context, and specific drug details such as weight and purity to impact the sentences handed down to offenders. These

27 "Federal Marijuana Law," Americans for Safe Access, accessed March 7, 2018, http://www.safeaccessnow.org/federal_marijuana_law.
28 United States Sentencing Commission, Mandatory Minimum, 2.
29 "Federal Marijuana," Americans for Safe Access.
30 *Ibid.*
31 "Federal Marijuana," Americans for Safe Access.
32 *Ibid.*
33 21 U.S. Code § 841 - Prohibited acts A, 21 U.S.C. § 841. Accessed March 7, 2018. https://www.law.cornell.edu/uscode/text/21/841.
34 Ingram, "Senators held."
35 Bellin, "Waiting for Justice."
36 Kelly Cohen, "Criminal justice reform poised to take off in 2018," Washington Examiner, December 30, 2017, accessed March 7, 2018, http://www.washingtonexaminer.com/criminal-justice-reform-poised-to-take-off-in-2018/article/2644603.
37 *Ibid.*
38 Thomson-DeVeaux, "Jeff Sessions."
39 Jeff Sessions, "Attorney General Sessions Delivers Remarks to the National Sheriffs' Association," news release, February 18, 2018, accessed March 7, 2018, https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-sheriffs-association.

reforms would allow for more individualized sentences that fairly reflect the complexity of drug operations and crimes, and that reflect the complexity of individuals' criminal circumstances. These bills would by no means end unjust sentences in our criminal justice system, as there are many other factors, such as institutional racism, that work against those convicted of drug offenses. Nevertheless, these crucial justice reforms would deliver more just punishments to many Americans and signal a national understanding of the importance of the individual defendants in the judicial process.

# Net Neutrality: Its Origins and Where It Stands Today

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Since the December 2017 Federal Communications Commission (FCC) ruling, "net neutrality" has been a buzzword for politicians and CEOs alike. The origins of net neutrality, however, stem much farther back than the ruling. The decision reclassified broadband Internet services as an internet service rather than a utility, giving Internet Service Providers (ISPs) more freedom to price and control high-speed internet delivery. That ruling reversed the 2015 Obama Administration's decision to enforce net neutrality regulations on the Internet industry, which would have required ISPs to deliver the same connection speed to all legal content providers (CPs) regardless of content or traffic. This paper looks at the impact of this ruling on businesses, as well as any possible implications it might have on the industry landscape.

Before the Internet was even commercialized, the federal government had distinguished between services offered by telephone carriers from services offered by ISPs. Telephone carriers are companies such as AT&T that offer communications networks across different mediums, ranging from cellular to internet. ISPs are the companies offering the actual Internet connection that is required for companies such as AT&T to do businesses. In other words, ISPs are the companies running the connection and backbone infrastructure service of the Internet (e.g. Comcast). ISPs are more lightly regulated than telephone carriers due to a series of decisions *(Computer Inquires)*[1] by the Commission more than fifty years ago. The decisions underline the difference between "basic" and "enhanced" services. Basic services are those whose interaction with the end-user was transparent, whereas enhanced services included technology that would act on these basic services or content. For example, telephone carriers offer a basic service because they are offering services (mobile cellphone plans) that directly deal with the customer buying a plan. Enhanced services include those of Comcast, whose business involves maintaining the quality of Internet connection for companies such as Netflix or other CPs. An Internet Service Provider offers the infrastructure network on which the telephone carrier company acts and uses, and never comes directly in contact with the end user of its product (the customer buying the phone plan). The Commission found that "enhanced services should not be regulated under the [Communications] Act" of 1934.[2]

Soon afterwards, the government brought an antitrust case against AT&T (then called "Bell Operating Companies") in 1982. The company had significant market power as the predominant telephone service provider across the nation, effectively operating as a monopoly. The government intervened using the Sherman Antitrust Act to break up the "Bell system" into a larger long-distance operating entity (Bell Operating Companies) and seven independent regional entities (then dubbed "Baby Bells").[3] This ruling was an opportunity to draw an even deeper line between different services, distinguishing telecommunication services from information services. Telecommunication services would include all the operations and offerings Bell Operating Companies (BOC) could sell to its clients, and information services would include "data processing and other computer-related services"[4] that BOC could not provide its customers. The distinction separated the medium of service provided (in this case telecommunications) from the infrastructural service of providing the network on which telecommunications runs on (internet service).

After the BOC ruling, President Clinton signed the Telecommunications Act of 1996 to maintain the competitive landscape of an Internet that is "unfettered by Federal or State regulation,"[5] incorporating the BOC ruling's definition of information services into statute. With this, government separated lightly regulated information services from heavily regulated telecommunication services. The rational for the bill came partly from the fact that American consumers had enjoyed the benefits of a free and minimally regulated market for broadband information services, and the bill served to preserve this very environment.

For the next two decades, the broadband Internet market enjoyed rapid innovation and technological improvements. The FCC repeatedly enforced a light-touch framework of legislation surrounding ISPs by favoring discrete and targeted rulings over comprehensive, sweeping regulation.[6] By 1998, the Internet had changed dramatically and with it came a need for clarification of specific terminology. The same year, the FCC submitted a report to Congress known as the Stevens Report to clarify existing terminology and its applications. The FCC reviewed the prior terminology used in the prior version of the Telecommunications Act in light of emerging technology and affirmed classification of ISPs as an information service.[7] The Report concluded that fostering growth in information services is essential to an advancing universal service system, which is the assurance that "low-income consumers can have access to phone services at reasonable rates."[8] As such, it also concluded that classifying ISPs as a telecommunication service rather than an information service would be greatly detrimental to the overall health and competitive development of the industry. [9]

1 Federal Communications Commission, *Declaratory Ruling, Report and Order, and Order on Internet Freedom*, by Ajit Pai, Mignon Clyburn, Michael O'Rielly, Brendan Carr, and Jessica Rosenworcel, FCC 17-166, Washington, D.C.: FCC, 2017, https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf [hereinafter "December 2017 FCC Ruling"].
2 Federal Communications Commission, *Report and Order on Remand, Declaratory Ruling, and Order on Protecting and Promoting the Open Internet*, by Tom Wheeler, Mignon Clyburn, Jessica Rosenworcel, Ajit Pai, and Michael O'Rielly, FCC 15-24, Washington, D.C.: FCC, 2017, https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.
3 December 2017 FCC Ruling, *supra* note 1.
4 *Ibid.*
5 *Ibid.* (citing 47 U.S.C. § 230(b)(2), from the Telecommunications Act of 1996).
6 *Ibid.*
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*

In years afterwards, the FCC sought to maintain light regulations in the ISP landscape in order to promote further growth in the industry. The idea was that ISPs were providing a product, high-speed Internet connectivity, that was increasingly thought of as an essential part of daily activities in the US.[10] In order to reinforce broad access to it, the FCC continued to affirm and expand the definition of ISPs throughout the 2000s.[11] In 2002, the FCC classified broadband internet service provided over a cable system as an "interstate information service" as well, which is to say that it also falls under ISP services.[12] his classification was reinforced by the Supreme Court in the *National Cable & Telecommunications Association v. Brand X*[13] decision later in June 2005. Between these two rulings in 2004, then-FCC chair Michael Powell announced four principles that would serve to protect Internet freedom: "the freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information."[14] These freedoms were then reaffirmed in 2005 when the Commission unanimously endorsed them in the Internet Policy Statement issued to apply these stances in future policymaking.[15]

There are clear advantages in having a minimally regulated environment for ISPs, as they serve to provide the high-speed and high-quality Internet infrastructure on which many other people, services, and companies run. What complicates the narrative is how much market power the ISPs should be allowed to have. Consider a 2008 case in which Comcast, the nation's largest ISP, was found blocking technologies that competed directly with its own business.[16] Specifically, Comcast used methods to block or slow down a technology called Bit-Torrent, which was running on its network. Bit-Torrent is a technology that allows users to download content from other computers through file sharing directly, making it a popular method of downloading content that users normally have to pay for, from others who have already paid for it. From Comcast's point of view, the company was providing high-speed Internet infrastructure for a CP (Bit-Torrent), whose high amounts of network usage (called "traffic") not only meant an increased amount of maintenance for "wear and tear" costs, but also cannibalization of Comcast's own revenues from users sharing content that is usually paid for. The FCC ruled that Comcast needed to stop discriminating against Bit-Torrent's traffic in an effort to promote consumer choice of content. The Comcast-Bit-Torrent Order was rather controversial given the previous decades of precedent promoting light regulation of the internet. The decision was ultimately reversed in 2010 by the US Court of Appeals for the DC Circuit, holding that the FCC did not have the regulatory authority to issue net neutrality rules.[17]

The same year, the FCC also issued an Open Internet Order explicitly preventing future discrimination against legal CPs and traffic.[18] In 2014, the DC Circuit moved again to reject the FCC's actions. It overturned all aspects in the Open Internet Order except for the preservation of the transparency clause.[19] The court declared the FCC's ruling as against its own characterization of ISPs as information service providers, not telecommunication service providers.

In the middle of President Obama's second term, he called for the FCC to classify ISPs, both consumer broadband service and mobile broadband Internet access, as telecommunications services.[20] The idea behind the "net neutrality plan" of the Obama administration, was to acknowledge the Internet's large role in everyday communication by essentially deeming it a utility, akin to water or electricity. In reclassifying the service under Title II of the Telecommunications Act, ISPs would be more heavily regulated and not allowed to offer paid prioritization plans[21]—deals CPs can make with ISPs which ensure faster service to their content or websites. This is the core of net neutrality—outlawing the possibility of "fast lanes" and other forms of content discrimination on the Internet. The DC Circuit also ruled on the President's reclassification, but this time a divided court upheld the administration's new classification of ISPs.[22]

In May 2017, the Commission issued a Notice of Proposed Rulemaking on Internet Freedom (NPRM) proposing a reclassification of ISPs and mobile broadband access services back to information services, rather than telecommunication services.[23] The idea is to return policy to a lighter touch framework in regards to the Internet service landscape. The rationale for doing so is that the minimally regulated environment of the past was conducive to the expansive growth and development of Internet services society enjoys today.

If the NPRM succeeds in becoming policy, it would cease to regulate the Internet as a public utility and reinstate the classification of ISPs and broadband Internet services as an information service. In other words, broadband Internet service providers would no longer be subject to the stricter set of regulations as telecommunication carriers and be free to implement fast-lanes for higher prices. This directly goes against the net neutrality plan of the Obama administration. Net neutrality seeks to prevent ISPs from charging content providers, such as a Netflix or Bit-Torrent, different prices for broadband Internet. It requires an ISP to charge the same price to a startup as it does to Netflix, in spite of the additional "wear and tear" costs (the maintenance necessary for the Internet to quickly stream high amounts of video to massive amounts of Netflix users) higher Netflix traffic causes. In other words, the ISP companies are not able to charge popular CPs like Netflix additional money for the additional service required to maintain the "wear and tear" costs imposed from increased user traffic.

The case of Netflix helps explain the various incentives associated with these changes. In 2014, amid the backdrop of a minimally regulated ISP environment, Netflix CEO Reed Hastings complained about "internet tolls," in reference to the higher fees ISPs could charge if given the explicit authority to create fast-lanes.[24] The company had believed Com-

10 *Ibid.*
11 *Ibid.*
12 *Ibid.*
13 545 U.S. 967 (2005).
14 December 2017 FCC Ruling, *supra* note 1.
15 *Ibid.*
16 *Ibid.*
17 Hassan Habibi Gharakhili. *The Role of SDN in Broadband Networks* (Singapore: Springer Singapore, 2017).
18 *Ibid.*
19 *Ibid.*
20 President Obama, Statement on Net Neutrality (Nov. 10, 2014), https:// obamawhitehouse.archives.gov/the-press- office/2014/11/10/statement-president-net-neutrality.
21 *Ibid.*
22 December 2017 FCC Ruling, *supra* note 1.
23 *Ibid.*
24 Joe Pinkser. "Where Were Netflix and Google in the Net-Neutrality Fight?"

cast might have incentives to purposefully block or decrease the quality of streaming services for Netflix content, as the two firms directly compete against each other for streaming users. The complaints came before Obama's net neutrality plan was approved, and the company had recently paid Comcast what is believed to be around $15-20 million to ensure that its content would not be slowed down.[25] Hastings was very publicly in favor of establishing net neutrality at the time, with a clear incentive to do so in order to avoid a similar internet toll in future years. When the 2015 ruling came out in favor of Hasting's position, Netflix had annual revenues of around $5.5 billion. Fast forward to 2017 when the FCC's Notice (the NPRM) signaled a likely reversal of a net neutrality friendly stance, and one would expect Netflix to voice similar complaints as they did in 2014. Hastings himself admits in a tech conference last May, "[the company's] big enough to get the deals [it] wants,"[26] with the difference now lying in the fact that the company's annual revenues have more than doubled. In other words, Netflix had risen to the ranks of other large technology companies that have a balance sheet large enough to pay off potential ISP fast-lane fees, leaving the smaller companies similar to the Netflix of 2014 behind.

In considering the importance of net neutrality, it might be useful to understand it in light of an analogy: a toll bridge. In this analogy, the different actors involved are the bridge owner, ordinary cars, and heavy trucks.[27] Heavy trucks are costlier for the bridge owner to service because of the increased wear and tear costs and the increased congestion from truck size. A simple solution for the bridge owner could be to raise the toll price for truck drivers, which would not only internalize the additional cost of trucks on the bridge onto truck drivers, but also incentivize fewer trucks to use the bridge in the first place.[28] It lowers both the depreciation (wear and tear) costs for the bridge owners, as well as reduces congestion.

In contrast, if regulatory authorities required the owner to charge the same price for all vehicles crossing the bridge, the ordinary cars would in effect be subsidizing trucks. The result of increased congestion would actually incentivize ordinary cars to use the bridge less, and thereby increase the cost of servicing the bridge.[29] Opponents of net neutrality argue that the same is happening with government-imposed regulations on ISPs. The regulation would prevent ISPs from engaging in differential pricing for the "trucks" of the Internet (Netflix) and the "cars" of the Internet (smaller CPs). As such, many opponents of net neutrality argue that the FCC's recent ruling is beneficial to society, as net neutrality creates inefficiency.

For obvious reasons, CPs such as Netflix or Facebook have clear incentives to favor net neutrality rulings. As highly popular content providers with lots of user traffic, net neutrality ensures that the companies do not need to expend any additional cost for the wear and tear maintenance imposed on the ISPs. However, the proponents of net neutrality do not solely consist of large, corporate CPs. Advocates of net neutrality have long feared that preferential treatment through the creation of fast and slow lanes harms competition in the Internet market and ultimately harms consumers of the technology.[30] Since large corporations such as Amazon or Facebook are the only ones that would have enough funds to ensure their content is delivered on "fast-lane" services, smaller content providers would likely be squeezed out of the market.[31] As such, the dominant and larger CPs could begin to have a monopolistic control over prices affecting consumers. For example, internet providers could make cable TV-like package subscriptions for Internet services[32] or charge consumers additional prices for access to certain websites.[33] The competition within internet service providers in the United States is rather limited in scope already, which would leave many American consumers forced to use a particular ISP's service. In the United Kingdom, net neutrality is not nearly as large of an issue precisely because there is competition for broadband Internet; 70 percent of households in the U.K. are serviced by at least four different broadband providers as of 2010, whereas most U.S. households only have one or two options.[34] In effect, broadband providers would have the ability to make internet fast-lanes for some companies while leaving others in the slower lane. Of course, just because the ISPs have the capability of doing so does not necessarily mean they have the incentive or that they will do so.

Other opponents of the ruling argue that it will further widen the digital gap in access to the internet, with millions of families in metropolitan areas like New York already unable to afford broadband access at home, and 20 percent of all Americans unable to afford it.[35] Advocates argue that the internet has in fact become a fundamental utility, with processes such as applying for jobs becoming nearly impossible without it.[36] An end to net neutrality could impose a further rise in the cost of Internet access, an outcome that would only further exacerbate the poverty divide in America today.

There is an endless laundry list of possible implications of the FCC's most recent ruling. Its decision to reclassify broadband Internet provider services as an informational service reverts back to two decades of light-touch regulation precedent. The Commission's ruling has yet to come to full fruition, but the debate around its subject matter is not and should not be taken lightly. How the Commission decides to rule on the matter will likely directly affect the lives of American consumers and businesses, especially as Internet consumption increases within the coming years.

*The Atlantic*, December 20, 2017, https://www.theatlantic.com/business/archive/2017/12/netflix-google-net-neutrality/548768/.
25 *Ibid.*
26 *Ibid.*
27 Keith N. Hylton. "Law, Social Welfare, and Net Neutrality," *Review of Industrial Organization* 50, no. 4 (2016): 417-29.
28 Habibi Gharakhili, *supra* note 17.
29 Hylton, *supra* note 27.
30 Cecilia, Kang, "F.C.C. Repeals Net Neutrality Rules," *The New York Times*, December 14, 2017, accessed March 18, 2018, http://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html.
31 Hylton, *supra* note 27.
32 Klint Finley, "Here's How the End of Net Neutrality Will Change the Internet," *Wired*, March 6, 2018, accessed March 20, 2018, http://www.wired.com/story/heres-how-the-end-of-net-neutrality-will-change-the-internet/.
33 Kara Alaimo, "How Google and Facebook Could Save Net Neutrality," *Bloomberg*, December 6, 2017, accessed March 20, 2018, http://bloomberg.com/view/articles/2017-12-06/how-google-and-gacebook-could-save-net-neutrality.
34 Hylton, *supra* note 27.
35 Jessica, Rosenworcel, "What Small Businesses Stand to Lose in a Net Neutrality Rollback," *Harvard Business Review*, December 12, 2017, accessed March 30, 2018, http://hbr.org/2017/12/what-small-businesses-stand-to-lose-in-a-net-neutrality-rollback.
36 *Ibid.*

# Advice and Consent:
## *A Discussion on the Politicization of the Judicial Nomination Process with Ronald Klain*

Jerry Yan (PO '18)
Senior Editor

*Ronald Klain is a seasoned veteran of the judicial nomination process, having served on the Senate Judiciary Committee and worked on judicial nominations in both the Clinton and Obama Administrations. He also served as a law clerk to Justice Byron White and currently is Executive Vice President and General Counsel at Revolution, a Washington, D.C.-based investment firm. On February 19, 2018, Mr. Klain visited Claremont and spoke at the Marian Miner Cook Athenaeum about his experience with Supreme Court nominations.*

**CJLPP**: Mr. Klain, I want to focus on your experience with the Supreme Court confirmation process. The first question I have for you is: how do you balance your partisan interests in getting someone you want on the Court with the nominee's political viability and their ability to get confirmed?

**Ronald Klain**: Presidents choose nominees for a lot of different reasons. They choose nominees in part because they are looking for someone to make a certain kind of contribution to the Supreme Court. They are looking for someone with a certain background, perspective, point of view, all these things. So, we can think about a big set of people that might fall within those parameters, and within that set of acceptable nominees is the question of the confirmation process. Can I get that person confirmed? How much political capital will I have to spend to get that person confirmed? And on the opposite end of it, how much political capital will I gain by nominating that person? What will that person's nomination and confirmation accrue to my political capital? And so, balancing those things are all part of the process a president goes through before he ultimately makes that choice.

**CJLPP**: Let's go back to Justice Souter's replacement—President Barack Obama ultimately settled on Justice Sonia Sotomayor to fill the seat in 2009. At the time, there was speculation that someone like Professor Pamela Karlan at Stanford Law School would be the nominee, and certainly within liberal circles she would have been a slam dunk: she has the qualifications and the right philosophy. So how did that sort of political calculus you just discussed come into President Obama's thought process regarding replacing Justice Souter?

**Klain**: That's a great question. As I said before, presidents pick from a set of nominees, and without revealing the confidences of that process, certainly Professor Karlan would be someone on that list. But inside that list, there are a lot of factors that go into a final decision, and one thing that was on President Obama's mind when he made that first choice was that there had never been a Hispanic member of the Supreme Court. There was a lot of desire in the Hispanic community for that, and presidents often want to make a historical statement by their pick. So, it wasn't a surprise that among those people the president could have picked, he centered in on a few candidates that had a Hispanic background, and among those candidates, landed on Justice Sotomayor. Every time I have been through this process with presidents—four times total—there were a number of people it could have been and a number of people it might have been, but in the end there's one person who it is, and a lot of things go into that decision. I think particularly in the case of President Obama, picking someone who would make a historical statement was very important for him.

**CJLPP**: There's a sentiment that a prospective nominee can say too much, especially after what happened to Robert Bork. There is a sense that if you have too much of a written record, that can come back to bite you, especially if the other side doesn't like what you have said or written. Professor Karlan herself once said: "Would I like to be on the Supreme Court? You bet I would. But not enough to have trimmed my sails for half a lifetime." So, do people who hope to be on the Supreme Court one day need to be more restrained in how they express themselves?

**Klain**: I don't agree with that—it's not a question of saying too much. If you look at Justice Sotomayor, for example, if you weigh the total of her writing, not just her academic work but her litigation work, for the Puerto Rican Legal Defense Fund, for her work in private practice, for her work in other public interest law practice—the number of pages she's written is literally in the tens of thousands. So, I don't think there's a question of trimming your sails and not expressing your views, the question really is: "what are those views"? At a given time, when the balance of the country, the balance of the Senate is some place, nominees can only get confirmed if they fall within a range of views that the Senate is willing to confirm. Judge Bork was outside that range, not just among Democrats but also among a number of Republicans who also voted against his nomination. Indeed, he was rejected by a pretty overwhelming margin, 58-42. The idea that you can't have a track record or a paper trail is false, but I do think that nominees' views have to fall within an acceptable range.

The other thing I'd like to say is that ideology is just a part of the decision. I talked about the historical background that Justice Sotomayor brought to the Court, but professional track record also matters. So, for better or worse, for the past 30 years, only sitting judges have been nominated to the Supreme Court. The one exception was Elena Kagan, who although not a judge, was the Solicitor General of the United States, who is called the "Tenth Justice" and is a judicial-like position. Going back to every nominee since Nixon's nominees over the past 30-40 years, presidents have generally picked among sitting judges. You can understand that—when I worked for President Bill Clinton and he wound up picking Judge Ruth Bader Ginsburg, he looked at a number of non-judges very hard. For example, he first offered the position to Mario Cuomo, who was the Governor of New York. But there has been a recent tradition of picking sitting judges because it's easier to assess their judicial temperament, how

they work as judges, all these things, so that's also a factor as to why someone may or may not get picked for the Supreme Court today.

**CJLPP**: Chief Justice William Rehnquist once wrote in his year-end memo to the federal judiciary that he did not like the trend towards appointing sitting judges to the Supreme Court. Of course, that was easy for him to say given that he was the United States Assistant Attorney General for the Office of Legal Counsel prior to his appointment to the Court. His critique was that if we keep going down this path, we are going to end up with a career judiciary where people start as district court judges and work their way up. Do you think that is a problem?

**Klain**: I do think that is a problem. Though I have worked with presidents who have adhered to that tradition, I share the late Chief Justice's view that the tradition is not a good one. I would like to see people from more diverse walks of life on the Supreme Court. Some of our great justices in history came from that kind of background—Earl Warren very famously came from a political background. However, there's a reason why this has become a tradition: sitting federal judges have been confirmed by the Senate previously and have some track record there. They've been through the process in a certain kind of way. They have judicial opinions you can look at and assess the quality of their judicial writing. I'm personally sympathetic to the argument for picking non-judges, but I also understand why presidents have done this for the past 30 years.

**CJLPP**: That ties into another question I wanted to ask you. One moment that stood out in the 2016 presidential election was right after Justice Antonin Scalia passed away, Governor Jeb Bush called his father's appointment of David Souter to the Supreme Court "unfortunate" and stated that he hopes to avoid making a similar mistake by looking at nominees' written records. Is having that written record part of the reason you would go with sitting judges?

**Klain**: That is definitely part of it. Instead of trying to guess what someone will do as a judge, being able to see what they've done as a judge is helpful. I think that the Souter case is interesting because I'm not sure that President George H.W. Bush didn't get exactly what he wanted with David Souter. His son might have wanted something different, but I think that President Bush was looking for a moderate, for someone who reflected more of his views on these issues. The Republican Party may have changed since David Souter was put on the Supreme Court in 1990, but I don't think that Souter was an "oops" by President Bush, it's just that the party changed in the 26 years since the time he was picked and the time Jeb Bush was talking about Supreme Court nominations.

**CJLPP**: Professor Amanda Hollis-Brusky, who teaches in the Politics Department at Pomona College, wrote about the Federalist Society in her book *Ideas with Consequences*. In that book, she discussed how the Federalist Society has successfully pushed the originalist mode of judicial interpretation and how that has taken over in conservative legal circles as the dominant legal orthodoxy. Do you think the Federalist Society been a source of change over the last couple decades?

**Klain**: There's no question that the Federalist Society has been enormously influential in conservative legal thought and in the Republican Party. The marriage between the Federalist Society and the Republican political leaders has been very complete. You see that in its full bloom now in the Trump Administration, where people very close to the Federalist Society played a key role in the judicial selection process inside the Trump Administration. President Donald Trump has largely picked people who were active in the Federalist Society for judicial nominations and has actually even steered away from input from Senators to more direct input from the Federalist Society. I think that their role in this process among Republicans is preeminent and that is definitely a dramatic change since George H.W. Bush's presidency in the late '80s.

**CJLPP**: Why is there no liberal counterpart to the Federalist Society? One critique Justice Scalia was fond of making was that liberal judicial ideology is not a cohesive package, rather, liberal judicial ideology more or less just amounts to "not originalism" and that does not work so well when you're trying to push something.

**Klain**: I have a couple answers to that. First, there is a liberal counterpart and it's called the "American Constitution Society." It's a liberal counterpart in that it's a national liberal legal organization, it has law school chapters like the Federalist Society, and it has lawyer chapters. ACS is different from the Federalist Society in two critical respects. The first is, as you noted, that the Federalist Society philosophy is very compact around originalism as an idea, though what they mean by "originalism" is interesting because different people have different definitions of it. Whereas, people in ACS have different views on constitutional interpretation and different progressive theories. There's a progressive textualist approach, there's this living Constitution approach—there are more varied approaches than in the Federalist Society, there's no question about that.

The second difference is that the Federalist Society has managed to capture a kind of preeminence in the legal right that the ACS lacks in the legal left. The legal left is more of an amalgam of groups. Some of those groups are built around specific issues, specific ethnic groups, or specific racial groups. The left is just more diverse than the right is in that sense. It is definitely different, but I also think that the progressive approach has certain strengths. It is more of a coalition of groups, and you've seen that, in the recent efforts to resist President Trump's policies, having the ACLU on the front lines litigating immigration issues, civil rights groups litigating some of those issues, groups like Public Citizen and environmental groups litigating environmental and regulatory issues. There's a wide array of groups tackling their own specialties and doing that very effectively.

**CJLPP**: Your discussion about cohesion in the legal left and legal right is interesting. When you see separate opinions from justices on the Supreme Court these days, they are typically from Justice Thomas or another conservative justice, whereas the more liberal justices have stuck together more often in recent years. The opinion in *Obergefell v. Hodges* stands out in my mind—they only had one opinion and none of the liberal justices issued separate concurrences. Justice Ginsburg went on the record and said that was very much an intentional choice and that they wanted to present a cohesive, united front. I am seeing a bit of tension there between the broader legal left and the liberal justices' philosophies—do you have any thoughts on that?

**Klain**: There is a difference in approach between the more liberal justices and more conservative justices, but there's also a difference in approach when you're in the majority versus the minority, and a difference in approach when you're trying to get to five versus when you're in the dissent and the need to have a coherent dissent is much less pressing. It's more situational than a left/right division, but I would say that among the current justices of the Court, there's a real effort by Justices Ginsburg, Breyer, Sotomayor, and Kagan to try and find common ground and try to find points of agreement. That hasn't always been the case. When I clerked at the Supreme Court in the late 1980s, more of the solo dissents—the one and two-justice dissents—came from Justice Marshall and Justice Brennan on the left. There were a lot of one and two-justice dissents from Justices Marshall and Brennan, that was quite common. I haven't counted it up, but I would guess that in the late 80s, Justices Brennan and Marshall probably accounted for more dissents than, say, Rehnquist or even Scalia.

**CJLPP**: In fall 2015, Justice Sotomayor visited Pomona College and a student asked her an interesting question: how do young people who might hope to one day serve as judges or in another position requiring Senate confirmation deal with people dredging up past writings and using them to attack nominees in the age of Facebook and Twitter? It's a kneejerk reaction for many young people today to see something and write a screed about it on Facebook. How do we deal with such verbose written records some 30 years down the line, especially when some may not like or agree with what we write now?

**Klain**: I'm glad that people express themselves, and I do encourage people to think before they post, and not just because of written records, or confirmation in the future, but because that's common sense and civility—you want your friends, family, classmates, and coworkers to not feel unduly offended by what you write and what you post. That said, future nominees will be called to account for what they've written. Justice Sotomayor is a great example of that—she never pulled a punch in a public speech, and she gave many of them. She never pulled a punch in her writings, in her litigation. Some of those things were controversial, but she sat in front of the Senate Judiciary Committee and she explained what she meant and explained it persuasively. The most controversial thing that she'd written was a statement about the role of personal identity in judicial decision-making and said "I would hope that a wise Latina woman with the richness of her experiences would, more often than not, reach a better conclusion" than other judges have in the past.

She caught a bit of flak for that particular line, but flak is okay. She explained what she meant, and most of the Senate accepted that and now sits as a Supreme Court Justice. So far from being why people need to pull back, I think Justice Sotomayor is an example of why you need to be engaged in the world. And her whole experience made her some enemies, yes, but made her a lot of allies too. In the end, the allies outnumbered the enemies, and she sits on the nation's highest court.

**CJLPP**: Cynically, though, flak is good when you have a filibuster-proof majority in the Senate.

**Klain**: Well, flak is good when you can explain your meaning persuasively and you are proud of what you say. What I'd say to a young, middle-aged, or old person is: if you write something that you're ashamed to write, that's hard to defend. If you write something that you're proud of, like Justice Sotomayor did with her statement of her personal experience and how she brings that to judging, that's easier to defend. Most senators agreed with it, and when Justice Sotomayor was nominated, we had exactly 60 senators, and she got more than that number in her confirmation. I think that being able to be a persuasive advocate for your own views is the most important thing.

**CJLPP**: In recent months, you have written about the Republicans' decision to abolish the filibuster for Supreme Court nominees and curb the Senate blue slip practice, which gives senators the opportunity to block nominees to lower federal courts located in the state they represent. Could you elaborate on your thoughts on that process a little more?

**Klain**: Yeah, it's important that the process of picking judges, whether for the lower courts or the Supreme Court, be a process that operates within the mainstream of American law. It should reflect compromise—when they're divided—between the views of the executive branch and the Senate, including the minority of the Senate. The extreme politicization and extreme polarization of the process, is not a healthy thing. I support institutional provisions that create guardrails on the process that keep the process in the middle of the spectrum. The ability of the minority to filibuster Supreme Court nominations is one of those guardrails, and I'm sorry to see that go away. The requirement that home state Senators submit blue slips on nominees is a double guardrail because it not only keeps the president from picking people who are far outside the mainstream but has also been a tool that senators from both parties have used to put together merit selection panels for district court nominees and even some court of appeals nominees, called bipartisan merit selection panels. And they've used the blue slip to make sure that the president picks someone nominated by one of these panels. So these things go together—when you pull away the blue slip then the merit selection panels lose their power and lose their influence. I would like to see us have more merit selection panels, I would like to see the blue slip come back, I would like to see the minority be able to have some impact on this process. All those things would be healthy steps to make the nomination and confirmation process stay within a broad set of constitutional guardrails.

**CJLPP**: If you were in Philadelphia in 1787 and you had complete discretion over how judicial appointments worked in the Constitution, what would you have done?

**Klain**: The constitutional design that we have is excellent and has worked for most of our history—but not all of it. There have been periods where it has spiraled out of control. Reconstruction was one period, the 1880s is a period very similar to today where we saw a lot of the same things. We saw a Supreme Court intervene in a presidential election in 1876, we saw a lot of bitterness from that, and then we saw the confirmation process break down—nominee didn't get a hearing, four out of the next five nominees barely got confirmed—it's a period very similar to today. And then the 1930s, with President Franklin Roosevelt and the court-packing plan, ultimately averted by a switch on the Court and

retirements. But by and large, the process has worked well for us over 229 years. I less want to go back in a time machine and rewrite what they did in Philadelphia and more want to say to current leaders to reinvigorate the "advice" part of the Advice and Consent Clause. We ought to reinstitute merit selection panels as much as possible for lower court nominees, maybe even the Supreme Court like President Gerald Ford used in selecting Justice John Paul Stevens. We ought to try to bring back a role for the minority party in the Senate for this and try to depoliticize, depolarize the judicial nomination and confirmation process. I'm not sure you could write more constitutional rules to make that happen, it's more of a question of institutional norms, institutional forbearance, institutional practice that's made that work for the vast majority of our history.

**CJLPP**: You were involved with the litigation over the Florida recount in the 2000 presidential election. At that point, you had already served in the Senate Judiciary Committee for a number of years, and then in the Clinton Administration for a number of years. Do you see that as a turning point in your career? Did that change your perspective on the nomination process after *Bush v. Gore* was decided?

**Klain**: I don't know about me personally, but it was a seminal event in how we see the Supreme Court. If you look at the history of the nominations and confirmations before 2000, and after 2000, there's a very different history. Since 2000, there have been seven people nominated to the Supreme Court. Two nominations were withdrawn—Harriet Miers and Merrick Garland. Of the five that ultimately got voted on by the Senate, four of them got more "no" votes than all but three nominees who got confirmed in the previous 100 years. So, the process has gotten much more contentious since *Bush v. Gore*, and I don't think that is an accident. The fact that the Court intervened in a way that seemed very political to most people shined a spotlight on the Court and kind of said "well, maybe this is a political institution, and maybe everyone does have a partisan jersey up there, and maybe that's the way we should think about this institution." The Court has paid a very heavy price for that intervention in our political process, and part of that price has been the shadow that has been cast over the nomination and confirmation process.

**CJLPP**: Do you see Chief Justice John Roberts's umpire metaphor and his emphasis on having fewer splintered opinions as part of a post-*Bush v. Gore* mindset?

**Klain**: I think it is. I'm skeptical of the umpire metaphor, but I respect the sentiment that he's trying to project in it and respect the institutional leadership he's trying to provide and trying to heal some of this divisiveness and cope with the consequences. He obviously wasn't on the Court for *Bush v. Gore*—he has no responsibility for it in that way, but he's been left with the consequences of it, and he is trying, as the leader of the institution, to heal some of those wounds.

**CJLPP**: I want to bring this back the college setting. Given how fast Republican leadership is moving through nominations, and that many students would presumably be concerned about some of those nominees, how would you suggest that students stay on top of it all and tell their elected representatives that this person should not be a judge in our state?

**Klain**: The most important thing people can do is get aware and get educated. Supreme Court nominations get a lot of attention. They're on TV, everyone knows who the nominees are, but lower court nominations go unnoticed. I go to some of these hearings and the room is virtually empty. We don't appreciate the significance of these nominations. But 95 percent of the cases filed in federal courts don't get to the Supreme Court. They are resolved by a lower federal court judge or judges. So those judges really are the law of the land in most cases. President Trump is having a gigantic impact on that. By next summer, President Trump will have picked one out of every eight judges.

**CJLPP**: At this current rate?

**Klain**: Yes. And there's no sign that this rate is going to change. By the end of his term, he will have picked 25-30 percent of judges. It's important first of all for people to become aware of this issue, and of its significance. And secondly, to weigh in with their senators and make it clear that they think some of the old traditional norms that have served our country well are valid. For example, the idea of the blue slip, the idea of really rigorous research of nominees' writings and points of view, the idea that the professional qualification ratings of the American Bar Association and minority bar groups should be taken into account, the idea that the judiciary should be diverse and look like America. President Trump has nominated almost 90 judges; of those 90 only one is African-American. He's nominated the lowest percentage of women in the last 30 years, the lowest percentage of people of color, the lowest percentage of people from a diverse array of law practice backgrounds—virtually no criminal defense lawyers, virtually no public defenders. So, the idea that the bench should look like the profession, look like America to some extent, that it should be more drawn from the mainstream, less from just the preferences of the Federalist Society are all important and people need to be aware of them and need to bring them to bear on their political leaders.

**CJLPP**: One moment that stood out was when Matthew Petersen, President Trump's nominee for U.S. District Court, did not know what a *Daubert* hearing was, which was absurd to people who know how the federal courts work, including the senator questioning him. But how do people who lack knowledge of how the law and the courts work assess a person's qualifications for a judgeship?

**Klain**: That's a great example, where whether you did or didn't know yourself what a *Daubert* hearing is, all you had to do was watch the face of Senator John Kennedy, a Republican senator, while he's asking these questions, while these answers were being given to understand what it all meant and what its significance was. What's lacking from this process is public awareness and public engagement. That's a great example, because the clip went viral, and you saw the reaction that it got. And that's awesome, but as I said, there have been nearly 90 nominees and only a couple clips have gone viral, meaning that 80-plus nominees have not. So that's what's really lacking in this process—public awareness and public focus.

**CJLPP**: Thank you very much for your time.

# A Game of Power: How the NFL Uses Taxpayer Money to Increase Profit

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Staff Writer

The National Football League is a staple of American entertainment. NFL games bring together people of all ages, races, genders, and religions. If you identify with a team, on Sunday game days, that becomes your only identity for those four hours. While football seems to be apolitical, and simply a fun pastime, the NFL is in fact extremely political, and has been since before the Super Bowl even began. NFL fans today want the league to remain "politics free" and be simply football. However, this narrative of whether or not the NFL should be political is entirely arbitrary. Much of the NFL's success is due to its political involvement. It is arguable that "the existence of the NFL as a multibillion-dollar business enterprise today is a direct result of its aggressive political engagement—a tradition that is, in fact, older than the Super Bowl."[1] Over 50 years ago, even before the NFL and the American Football league merged, the NFL was lobbying Congress for policy changes that would benefit their organization financially. Since then, the NFL has been engaged and involved with many political actions that the public does not see. It has allowed them to monopolize and become one of the most powerful organizations in the nation. It benefits off of millions of dollars in taxpayer money, and keeps the resulting profits for itself. The NFL's politics has changed legislation throughout the years to laws that specifically benefit their organization. The politics of the sport have a large influence on the policies of the nation. The NFL is an organization that is unfairly profiting off of American taxpayer money, when they have the ability to fund themselves. Instead, they fund their lobbyists to ultimately make more profit. So, while many fans are arguing whether or not the NFL and its players should be bringing politics into the game, they should realize that the league has already been politicized for over half a century.

In the mid-20th century, the NFL was a young organization which sought out Congress for a way to help them succeed financially. This was the beginning of an entrenched relationship between the organization and the legislature in which the NFL influenced public policy to benefit their objectives, all without public scrutiny. Today, the NFL is built up of 32 franchises, each valued at an average of 2.5 billion dollars. Last year alone, the NFL operating profits were 101 million dollars per team.[2] This is not standard for American athletics. In fact, "[t]he $3.2 billion in league-wide income is $500 million more than the combined earnings of teams in the NBA, NHL and MLB."[3] While the NFL is a wildly successful institution today, in the mid-20th century, the NFL was still being overshadowed by Major League Baseball's popularity and the National Basketball Association's quick rise to fame. At this point in time, the NFL and the American Football League (AFL) were separate entities. Beginning "in 1957, a full decade before the first Super Bowl, the NFL was still a fledgling enterprise trying to muscle its way to the front of the nation's sporting consciousness, when the U.S. Supreme Court ruled that its method of negotiating television broadcast rights violated antitrust laws,"[4] which threatened to rid the NFL of their ability to have all thirty-two individual teams to collectively negotiate contracts with television networks for game coverage as one organization, which would lose them a significant amount of money. The young NFL then lobbied Congress to pass what is known as the Sports Broadcasting Act of 1961, "a law that effectively invalidated the court's ruling by giving the NFL a limited exemption from antitrust law."[5] Although the NFL was young, they were able to lobby Congress and change the law to benefit them. Antitrust laws are put into place to prevent organizations from monopolizing and making a market "anticompetitive." If the NFL has one contract with all 32 teams, there is no competition. The NFL would therefore have a monopoly over American Football. Allowing this was Congress's first act of accommodating the NFL, exempting the league from following laws that other organizations do. Without this law, each individual team would have to work out contracts with networks for their individual games. This has given the NFL the ability to monopolize as one entity and make even more money.

In 1966, the American Football League and the National Football League merged. Prior to the merger, Congress had adjusted the law so that "the statute said that if the two pro-football leagues of that era merged...the new entity could act as a monopoly regarding television rights."[6] Therefore, the newly combined NFL and AFL could negotiate contracts to stream all teams' games and events, as one company. That year "CBS paid $2 million for the right to broadcast the NFL's championship game."[7] This has given the NFL the ability to make an absurd amount of money from television broadcasting. NFL games are so popular and desired by networks because "last fall, 34 of the 35 most-watched TV shows were NFL games."[8] The NFL offers entertainment that people want to watch and networks want to broadcast, and Congress' adjustment to the antitrust law has been critical in making the league worth billions.

Beyond antitrust laws, the NFL also circumvented federal restrictions on online gambling through its institution of fantasy football. Fantasy sports have been critical in increasing NFL viewers and fans, and they are believed to "have an annual economic impact in the neighborhood of $4 billion."[9] However, this revenue is from what is essentially online gambling. Since 2006, when the Unlawful Internet Gambling Enforcement Act (UIGEA) was instituted, companies cannot accept

1 Badenhausen, Kurt. "The Dallas Cowboys Head The NFL's Most Valuable Teams At $4.8 Billion." *Forbes*. November 01, 2017. Accessed April 01, 2018.
2 Ibid.
3 Waldron, Travis. "The NFL Has Always Been Political." *The Huffington Post*. September 26, 2017. Accessed February 28, 2018.
4 *Ibid.*
5 Badenhausen, *supra* note 1.
6 Easterbrook, Gregg. "How the NFL Fleeces Taxpayers." *The Atlantic*. February 19, 2014. Accessed February 28, 2018.
7 Kang, Cecilia. "How the Government Helps the NFL Maintain Its Power and Profitability." *The Washington Post*. September 16, 2014. Accessed February 28, 2018.
8 Easterbrook, *supra* note 6.
9 Smith, Chris. "Why Is Gambling On Fantasy Football Legal?" *Forbes*. September 20, 2012. Accessed February 28, 2018.

payments affiliated with betting or wagering online, so how does the NFL do it legally? Not surprisingly, because fantasy football drives so much profit for the NFL, this form of online gambling is exempt from the UIGEA, due to the league's successful lobbying practices. They hired lobbyists specifically for this exemption, and maintain lobbyists to prevent it from changing today.[10] Cecilia Kang, esteemed journalist who spent over a decade writing for the *Washington Post*, and now writes for the *New York Times* describes the UIGEA fantasy sport exemptions in her article titled "How the Government Helps the NFL Maintain its Power and Profitability." She states:

> "The Unlawful Internet Gambling and Enforcement Act of 2006 (UIGEA)... carves out a safe haven for any fantasy or simulation sports game that: 'has an outcome that reflects the relative knowledge of the participants, or their skill at physical reaction or physical manipulation (but not chance), and, in the case of a fantasy or simulation sports game, has an outcome that is determined predominantly by accumulated statistical results of sporting events.'"[11]

Essentially, the law states that if the gambling is based on "skill" then it is legal. The law even "specifically mentions fantasy sports as something allowed under the law, as long as people are not betting on the outcome of a single game or the performance of a single player."[12] Because in Fantasy Football an individual would likely have to possess a degree of knowledge about the game and the players' stats to be successful, this is considered to be based in skill. This exemption for the NFL has made huge changes in profits. Since the UIGEA was enacted, the fantasy sports industry has grown by an average 12 percent annually.[13] Sites including DraftDay, FanDuel, and Fanball "host millions of dollars in transactions between players who organize and bet on new lineups each week."[14] With money on the line, even more people want to watch the NFL, giving the organization more money and more people to buy into the brand.

The NFL also utilizes taxpayer money for their own profits, by getting government funding and loans to build their stadiums and practice facilities. In fact, "about 30 stadiums have been built with some or all-public financing."[15] There are only 32 NFL teams, and thirty stadiums have been partially or entirely paid for with taxpayer money. In total, "the NFL, over the last 20 years, has also benefited from nearly $7 billion in tax subsidies that have helped its teams build stadiums that enrich its already-wealthy owners."[16] Moreover, the NFL utilizes these drastic tax subsidies from the government and profits off of the stadiums. The profits from ticket sales do not go back to the taxpayers; instead they go to the private teams. Seeing as the team is "privately held, the team is not required to disclose operating data, despite the public subsidies it receives."[17] This means that the government is left out of the loop in regard to how much these teams are benefiting from this taxpayer money. Cities are losing a drastic amount of money to help NFL teams that frankly do not need the money. In 1996, the city of Cincinnati increased its sales tax to support the building and maintenance of its stadiums, including that of the NFL Bengals team. As a result, the "sales taxes didn't cover the expenses, and the city is struggling with $43 million in annual expenses to maintain the stadiums."[18] In an effort to look better to the city, the Bengals organization released press materials that "declare that the team gives back about $1 million annually to Ohio community groups. Sound generous? That's about 4 percent of the public subsidy the Bengals receive annually from Ohio taxpayers."[19] So while the Bengals are getting praised for helping out the community, they are actually taking more money from the community than they are giving and using it for their own profit. This is not an isolated incident. In Minnesota, where the NFL Vikings reside, the state was facing an extreme budget deficit of $1.1 billion.[20] However, in order to help finance a new facility, the government used "$506 million from taxpayers as a gift to the team, covering roughly half the cost of the new facility."[21] In truth, government goes far out of its way to accommodate NFL teams. Virginia in 2012 contributed $4 million to Washington's team's training facility and headquarters.[22] However, it is not like these teams need the money. The owner of the Minnesota Vikings is worth $322 million dollars, and the owner of the Washington Redskins is worth an estimated $1 billion.[23] These stadiums result in more wealth for the teams and the owners, at the expense of the taxpayers. The owners of NFL teams consist of some of the wealthiest men in America. So why is it that, "league-wide,[24] 0 percent of the capital cost of NFL stadiums has been provided by taxpayers, not NFL owners"?[25] This is incredibly problematic because many Americans do not know this. NFL teams, like the Bengals, donate small portions of money in comparison from what they get in taxes, and are therefore framed as heroes that help their community. It is wildly inaccurate and dishonest. The NFL uses taxpayer money to fund the facilities that collectively make the teams and the organization billions of dollars.

The Department of Defense has been paying professional sports teams to advertise for and celebrate military personnel. In an act that appears gracious and patriotic, much of the country is not aware that the NFL is cashing in. At most NFL games people can see some sort of celebration of military personnel, whether it is welcoming those who have served, bringing a soldier home to their family, or bringing them out to meet the players before the game. However, what the fans do not realize is that this is not always a patriotic and respectful act done by the teams. Instead, they are being paid to do these odes to military personnel by the Department of Defense. In fact "the Department of Defense doled out as much as $6.8 million in taxpayer money to professional sports teams to honor the military at games and events over the past four years."[26] While the patriotism is advertised, the reason behind it is not well known to the public. They make it appear genuine and appreciative, when really they are trying to increase their paychecks. The amount of money given to the NFL from the Department of Defense has been "'downplayed' amid scrutiny," according to a report released by two Republican Senators. The amounts given to the NFL are staggering, including $115,000 given to the

10 Falchetti, Joe. "A Lookback on the Unlawful Internet Gambling Enforcement Act of 2006." *CalvinAyre.com*. October 15, 2012. Accessed March 30, 2018. https://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006/.
11 Waldron, *supra* note 3.
12 Kang, *supra* note 7.
13 Smith, *supra* note 9.
14 *Ibid.*
15 Kang, *supra* note 7.
16 Waldron, *supra* note 3.
17 Easterbrook, *supra* note 3.
18 Kang, *supra* note 7.
19 *Ibid.*
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 *Ibid.*
26 Barrón-López, Laura, and Travis Waldron. "Pentagon Paid Up To $6.8 Million Of Taxpayer Money To Pro Sports Teams For Military Tributes." *The Huffington Post*. December 19, 2016. Accessed February 28, 2018.

New York Jets by the New Jersey Army National Guard, and $879,000 given to the Atlanta Falcons over the course of just three years.10 Over those same three years, "The New England Patriots, Buffalo Bills and Baltimore Ravens each received at least $500,000."[27] It is interesting that the DOD utilizes the NFL to do their marketing, and has them do so without disclosing the finances behind it. It makes the celebration of the United States military look far more genuine and less contrived than it truly is. Over four years, eighteen NFL teams were paid over $5.6 million to celebrate the military.[28] As though the NFL is not benefiting enough from taxpayer money, this act feels more dishonest than the rest. The National Football League is a ridiculously wealthy organization. How is it fair that individual taxpayers are helping fund it?

The National Football League has an incredible amount of power in determining policy in the United States. When laws are put into place that prevent NFL profit, they are often changed as a result of aggressive lobbying sponsored by the NFL. The NFL is not an inherently unjust organization that uses rent-seeking to exploit the funds of the public. Its games and larger events, like the Super Bowl, can bring together people from all over the country. However, their power and control of the United States Government and unfair benefit from taxes is outlandish. They should be funding their own stadiums and practice facilities if they are going to be profiting from them. A simple solution would be for the local and national governments to cut off the NFL financially. However, when a city says they cannot fund a new stadium or practice facility, the team threatens to pack up and relocate to another city. This is unfair to the people who live in the cities and pay higher taxes to fund a team owned by a billionaire. The NFL needs to be self-sufficient and should not rely on government funding to further their profits.

27 Easterbrook, *supra* note 3.
28 *Ibid.*

# Me Too, Anita:
## *Reimagining the Movement Against Sexual Harassment After the Hill-Thomas Hearings*

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Guest Contributor

In the spring of 2016, *HBO* released a hit feature film, *Confirmation*, based off the infamous Hill-Thomas hearing when the nation watched in shock on October 11, 1991 as Anita Hill testified against Clarence Thomas's nomination to the Supreme Court, saying he sexually harassed her when he was her boss. While the movie producers have argued that the film was not meant to play any certain angle, it was released at an opportune, and contentious, time, refueling conversations about the abuse that women continue to face at the office behind closed doors. *Confirmation* revisits Anita Hill's testimony against Clarence Thomas before his confirmation to the Supreme Court and is a reflective reminder of how powerfully relevant Hill's experiences are in popular culture today. It has been over two decades since the Hill-Thomas hearings pushed the issue of sexual harassment in the workplace into the national spotlight and into public consciousness, and now, in 2017, the conversation has resurfaced after multiple, explosive allegations against powerful men including Harvey Weinstein, Kevin Spacey, Al Franken, and even the President of the United States.

This paper explores how Anita Hill's testimonies reframed the politics of sexual harassment and gave platform for the conversation to be reopened in 2017 and discusses the differences in cultural conditions to galvanize change in 1991 versus now in 2017. It begins with the legal history of sexual harassment prior to the Hill-Thomas hearings, followed by a brief of the hearings themselves and the catalyst for transformation that they set in motion. The current revelations about the prevalence of sexual violence in every aspect of women's lives, especially in the workplace, that have come to light today, and the subsequent 'Me Too' revolution against the historical backdrop provided by the Hill-Thomas hearings are then examined. This paper seeks to answer the question of why was Clarence Thomas confirmed to the Supreme Court but the men accused today are being consistently held accountable by their companies the media, and the American people? It is argued here that there are three key characteristics of the current movement that set it apart from the mobilization of women in the country against sexual harassment that followed Hill's testimony. This paper then explores the impact of social media as a platform to amplify survivor's voices in a way that Anita Hill was never afforded, as well as the way that generational and cultural shifts and the politics of race have impacted the outcomes of 1991 versus now. These differences are a huge part of the reason why today's movement has worked in holding men responsible and ensuring actionable consequences against perpetrators. Ultimately, how did Anita Hill reframe the conversation around sexual harassment and set the stage so that this movement could gain momentum today?

**Legal History of Sexual Harassment Before 1991**

In the late 1970s, the term for sexual harassment "had just entered the popular lexicon and the law."[1] The term was first coined by three professors at Cornell University's Human Affairs Program in 1975 named Lin Farley, Susan Meyer, and Karen Sauvigne. They reached out to over one hundred lawyers across the country for help with building a sexual harassment case for Carmita Wood, a Cornell University secretary who had resigned after three years of abuse by her boss. In April 1975, the Human Rights Commission in New York City held hearings about women's workplace rights, where Professor Farley spoke about sexual harassment and Carmita Wood's experience. Soon afterwards, the *New York Times* published an article titled, "Women Begin to Speak Out Against Sexual Harassment at Work," the first time the phrase had ever appeared in a national publication. *Redbook* then launched a survey asking its readers to document their encounters with sexual harassment. The September 1976 issue of *Redbook* then discussed the survey results and described the issue as "pandemic."[2] Efforts to recognize sexual harassment through litigation, however, were varied, and the phrase faced difficulty gaining legal traction in courtrooms as judges were reluctant to label sexual harassment as a form of discrimination based on sex.

In 1979, feminist legal scholar Catherine MacKinnon published her groundbreaking book *Sexual Harassment of Working Women*, in which she argued that the law failed to see sexual harassment as occurring within a larger social framework and that harassment perpetuates the stereotypes of women's subordinate place in the workplace and in society. MacKinnon's book clearly defined sexual harassment as discrimination under Title VII. *Sexual Harassment of Working Women* became the groundbreaking legal framework used in Mechelle Vinson's sexual harassment case, *Vinson v. Taylor*, now known as *Meritor Savings Bank, FSB v. Vinson*.

Mechelle Vinson, an African-American woman working as a bank teller at Capital City Federal Savings Bank in Washington D.C., sought out an attorney after facing nearly four years of extreme sexual harassment and abuse from her boss, Sidney Taylor. Taylor threatened to fire Vinson if she did not comply with his sexual demands and created a hyper-sexualized workplace environment by perusing porn magazines in front of her and exposing himself to her in the bathroom. Vinson filed a case in 1978 against the bank, alongside her attorney John Marshall Meisburg Jr., who agreed to take the case if Vinson was able to acquire at least two affidavits from other women who could corroborate. In 1980, a U.S. District judge ruled against Vinson, saying employers in sex harassment cases, unlike other discrimination cases, could be held liable only if they had been notified of the harassment and failed to respond. The

1 Thomas, Gillian. Because of Sex, pg. 85. New York, NY: Picador, 2016.
2 *Ibid.*

U.S. Court of Appeals for the District of Columbia Circuit reversed that decision, and the bank appealed the case to the Supreme Court, making the case the first ever sexual harassment suit to reach the highest court.

In March of 1980, the Equal Employment Opportunity Commission (EEOC) updated its guidelines on sex-based harassment and intimidation and declared that sexual harassment violated Title VII, strengthening Vinson's case. In 1986, the Supreme Court ruled unanimously in Vinson's favor, holding that sexual harassment violates federal laws against discrimination and that companies can be held liable for sexual harassment committed by supervisors even if the company is unaware of the harassment. Some of the harshest objections to the EEOC's new guidelines and the Supreme Court's ruling ironically came from Clarence Thomas, who was the EEOC Chair at the time. Thomas's top assistant at the time felt differently and believed that the agency should stand squarely behind its guidelines and Mechelle Vinson. This assistant was Anita Hill, and as Gillian Thomas writes, "A stunned nation learned six years later [that] Hill claimed to know from experience what a hostile work environment created by a supervisor felt like."[3]

**The Hill/Thomas Hearings**

Mechelle Vinson's case was a victory on the legal front for women facing sexual harassment, but while it revolutionized the law, it did not revolutionize American culture. It took another African-American woman, this time Anita Hill, to come forward to disclose her experience of sexual abuse to finally and fully galvanize a national conversation about sexual harassment. Catherine MacKinnon writes,

> "What happened in the Hill-Thomas hearings, among other things, was that sexual harassment became real to the world at large for the first time. My book of 1979, framing the legal claim in the way that it became legally accepted, did not do this. The EEOC Guidelines of 1980 did not do this. Winning Mechelle Vinson's case in the Supreme Court in 1986 did not do this, although all these helped prepare the way. Anita Hill did this: her still, fully present, utterly lucid testimony, that ugly microphone stuck in her beautiful face, the unblinking camera gawking at her from point blank range."[4]

Thus, while the legal vocabulary for sexual harassment had already long before been defined, Anita Hill "put a face to the name" and made it clear how entrenched and pervasive the issue continued to be.

In 1991, as debates about Clarence Thomas's nomination to the Supreme Court by President George H.W. Bush were heating up, Anita Hill contemplated whether or not to come forward with her story. She wrote in *Speaking Truth to Power,* "[t]he divisive nature of the political debate surrounding the nomination made it even more difficult for me to think about coming forward. I had no desire to become embroiled in the drama that was unfolding in the African American community or the political community as a pawn for either side."[5]

However, as more people, especially the news media, became aware of rumors about a woman that had been harassed by the Supreme Court nominee, Hill came forward and testified before the Senate Judiciary Committee on October 11, 1991. She described the lewd discussions that Thomas had with her about sex, including his vivid descriptions of acts that he had seen from porn. The hearings were broadcast on live television, and millions of Americans tuned into watch Hill be questioned by an all-white, all-male panel. She was subjected to withering, skeptical questioning and racialized and sexualized comments from the committee. Pennsylvania Senator Arlen Specter asked, "How could you allow this kind of reprehensible conduct to go on right in the headquarters without doing something about it?" And Alabama Democrat Howell Heflin questioned Hill, "Are you a scorned woman?" The four female witnesses that had accompanied Hill to testify to her credibility were never called and there was no convened panel of expert witnesses that could inform the committee of the pressures that women face to keep sexual harassment and abuse to themselves. After three days of testimony, the Senate still narrowly confirmed Clarence Thomas to the Supreme Court with a vote of 52 to 48. At the time of the hearings, a *New York Times* poll found that the American public overwhelmingly believed Thomas over Hill-58 to 24 percent.[6] After the hearing was over, Hill continued to face enormous public backlash, including death and sexual violence threats and a campaign to remove her from her current job.[7]

**Years of the Woman**

Women, however, were outraged at the outcome of the nomination hearing and furious at the way that Hill had been silenced. During the Hill-Thomas hearings they had marched in support of Hill, and after Thomas was confirmed they became emboldened to run for office. The year after Hill testified, 1992, became known as "the Year of the Woman," as record numbers of women from across the political spectrum ran for public office and were elected to Congress. Twenty-eight women were elected to the House of Representatives, more than doubling the total number of female representatives to 47, and four new women joined the only two women then serving in the Senate.[8] Diane Feinstein of California became the first woman to sit on the Senate Judiciary Committee that Hill had testified before. This was seen as a direct response to the treatment Hill received from the Senate, which was at the time 98 percent male.[9] Sexual harassment claims to the Equal Opportunity Employment Office more than doubled after the hearings from 6,883 in 1991 to 15,618 in 1998.[10]

The same trend is evident now as women have realized after the election of Donald Trump that their voices are not well represented in American politics. As Journalist Jodi Enda writes, "Trump has reinvigorated feminism and the women's movement in a way that nothing has done for decades."[11] The release of Trump's *Access Hollywood* tape, in which he brags about assaulting women, and his subsequent ascent to the presidency,

3 *Id.* at, 99.
4 *Id.* at, 104-105.
5 Hill, Anita. Speaking Truth to Power, pg. 103. New York, NY: Anchor Books, 1997.
6 Massie, Victoria. "How racism and sexism shaped the Clarence Thomas/Anita Hill hearing." *Vox*, April 16, 2016. https://www.vox.com/2016/4/16/11408576/anita-hill-clarence-thomas-confirmation.
7 *Ibid.*
8 Greenberger, Marcia. "What Anita Hill did for America." *CNN*, October 22, 2010. http://www.cnn.com/2010/OPINION/10/21/greenberger.anita.hill/index.html
9 *Ibid.*
10 *Ibid.*
11 Blair, Elizabeth. "Women are speaking up about harassment and abuse, But why now?" *NPR*, October 27, 2017. https://www.npr.org/2017/10/27/560231232/women-are-speaking-up-about-harassment-and-abuse-but-why-now.

has become the same catalyst for change in 2017 that Hill's appearance in front of the Senate did. This year has, in essence, become a second "Year of the Woman," as women have yet again run for and been elected to public office in record numbers. This cycle, 353 are already reportedly running for the House of Representatives in 2018, as compared to 272 in 2016.

**Breaking the Silence Again in 2017**

Almost 40 years ago, the cover of the November 1977 *Ms.* Magazine issue depicted a man's hand reaching into a puppet woman's blouse, and read, "Sexual Harassment on the Job and How to Stop it."[12] The cover article described how eighty-eight percent of the women interviewed by the magazine had experienced sexual harassment or misconduct in the workplace. The author reported that the problem permeated almost every profession but was particularly pernicious "in the supposedly glamorous profession of acting," in which Hollywood's casting couch remained a "strong convention."[13] The article went on to prophetically describe the forthcoming revelations as "only the tip of a very large and very destructive iceberg." [14]

Almost four decades later as allegations about Harvey Weinstein, and so many other influential figures, have come to light, the iceberg has more fully emerged. The enlightenment of 2017 has been likened to a dam breaking and the floodgates opening–the beginning of a huge movement activated by the cumulative effect of harassment claims that have built up over decades. Others have described these exposés as "the other shoe dropping" after the release of Trump's *Access Hollywood* tape. Since accusations against film director Harvey Weinstein first emerged in October, dozens of other powerful men have been accused of sexual harassment and assault. There have been 42 high-profile men accused of sexual misconduct that have been officially fired, removed, or resigned from their jobs, companies, or productions. They include Harvey Weinstein, Mark Halperin, Kevin Spacey, Louis CK, Charlie Rose, Danny Masterson, and Matt Lauer.[15] More than 24 other publicly familiar men that have been accused have faced lesser fallout such as suspensions.[16] As more men accused of harassment and assault fall from power in Weinstein's wake, we continue to witness the reordering of a culture that has long invested itself in the protection of men and their reputations at an incredibly high cost, paid overwhelmingly by women–a reordering made possible by cultural conditions that weren't present at the time of the Hill-Thomas hearings.

**The #MeToo Movement and the Role of Social Media**

As allegations against Harvey Weinstein broke, other victims of sexual harassment and assault took to social media to share their stories and post #MeToo. Within a day there had been over 12 million 'Me too' posts on Facebook and within a week, the hashtag on Twitter had reached over 85 countries with 1.7 million tweets.[17] #Metoo has been translated into multiple languages and has allowed women and men who are survivors of all forms of sexual violence to find one another and connect with each other's stories.

Social media has been a key feature in this new movement against sexual harassment and assault and it is a defining reason why today's perpetrators are facing harsher repercussions and outcomes than Clarence Thomas did. First and foremost, it has become far more difficult for disbelievers to cast doubt on the allegations against any one of the accused men, simply because there are so many of them. After one woman comes out to share her story, as Ashley Judd first did against Harvey Weinstein, more women feel safer to also go public with their experiences, and those experiences are then widely shared through social media. Anita Hill had to stand alone to bear witness to a secret that so many women across the country felt pressured to keep quiet, and her singularity allowed the Senate Judiciary Committee to undermine her credibility and character. Social media has also made it possible for the public to pressure the news cycle to hold accused men accountable and has provided numerous networks of support for survivors of abuse. These platforms have infused the coverage of sexual harassment and abuse into American culture and into the lives of Americans continuously day after day and therefore set the cultural conditions in motion that could lead to the movement's lasting success.

**A Generational and Cultural Shift**

In an October 2017 interview with *NPR*, Hill said, "[s]ince 1991, we have been raising children — daughters in particular — with the understanding that sexual harassment is illegal, shouldn't be tolerated, and that it's wrong."[18] Hill credits this generational shift, and with it a subsequent cultural change, as part of the reason why men are increasingly being held responsible for sexual misconduct in the workplace and outside of it. The shift is also indicative of a new period in American history–working women of a new generation, who most likely grew up with working mothers, have said that enough is enough. And with these generational shifts come cultural changes that have pushed the conversation beyond harassment and out into the open for everyone to discuss. As the *New York Times* put it, "[t]he new conversation goes way beyond the workplace to sweep in street harassment, rape culture and "toxic masculinity" — terminology that would have been confined to gender studies classes, not found in mainstream newspapers, not so long ago."[19] This generational shift that coalesced after Anita Hill has created a culture in which conversations about all kinds of sexual abuse are acceptable to be had out in the public, and not just in private behind closed doors.

**The Politics of Race Then vs. Now**

In *Race-ing Justice, En-gendering Power*, Toni Morrison writes, "Anita Hill's description of Thomas's behavior toward her did not ignite a careful search for the truth; her testimony simply produced an exchange of racial tropes."[20] The Hill-Thomas hearings were intensely racialized, and Anita Hill faced heightened scrutiny not only because she is a woman, but because she is an African-American woman, as did Carmita Wood and

12 Bennett, Jessica. "The 'Click' Moment: How the Weinstein Scandal Unleashed a Tsunami." *New York Times*, November 5, 2017. https://www.nytimes.com/2017/11/05/us/sexual-harrasment-weinstein-trump.html.
13 *Ibid.*
14 *Ibid.*
15 Almukhtar, Sarah. "After Weinstein: 42 Men Accused of Sexual Misconduct and Their Fall From Power." *New York Times*, December 13, 2017. https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html.
16 *Ibid.*
17 Park, Andrea. "#MeToo reaches 85 countries with 1.7 million tweets." *CBS*, October 24, 2017. https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/
18 Blair, "Women are speaking up about harassment."
19 Bennett, "The 'Click' Moment"
20 Morrison, Toni. Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality. NY, New York: Pantheon Books, 1992.

Mechelle Vinson before her. There is a stark difference between the accusers and the accused in 2017 versus Anita Hill and Clarence Thomas. This time around, primarily white, influential, and well-known women have unleashed allegations against primarily white, influential, and well-known men. The cultural condition that so affected the Hill-Thomas hearings remains in place today–that American society props up power structures that privilege white voices over others. While this topic alone deserves the attention of an entire paper, it is impossible to assess the difference between the Hill/Thomas hearings and today's powerful movement without assessing the way that racialized power structures have led to the different outcomes. "If you think about the way the hearings were structured, the hearings were really about Thomas' race and my gender," Hill said in 2002. "…[But] how do you think certain people would have reacted if I had come forward and been white, blond-haired and blue-eyed?"[21]

**From 'I Believe' to 'Me Too'**

As Anita Hill stood alone and shared her experiences with the Senate and with the nation, she said, "It would have been more comfortable to remain silent…I could not keep silent."[22] Hill's testimony blew the top off of the modern workplace's most enduring secret–sexual harassment. 26 years later, the top has blown off again, this time by an entire nation of women. The response to the allegations that began with Harvey Weinstein and have developed into a movement proves that the American public continued to be seemingly unaware of, or perhaps still isolated from, the experiences of women continued to endure after 1991.

But now the country is aware again, and cultural conditions have made it so that this is a watershed moment that we can't easily neglect. Anita Hill increased women's access to justice, and now millions of women are increasing that access for those around them and powerful men who have abused their privilege for so long are finally being held accountable as Justice Clarence Thomas never was. In 1991 women wore "I Believe Anita" buttons. Now they post #MeToo. It is indicative of a clear shift from a message of solidarity but not self-exposure to a message of unity in the shared experiences of so many women. Women are not just standing by others who come out about the harassment they have faced but standing with them and identifying themselves with those that have been harassed too.

**After Anita**

In *Speaking Truth to Power*, Anita Hill's memoir of the hearings, she wrote, "The event known as the Hill-Thomas hearing has been described variously as a watershed in American politics, a turning point in the awareness of sexual harassment, and a wake-up call for women. For me it was a bane which I have worked hard to transform into a blessing for myself and for others. And because it brought to bear for the average public issues of sexual harassment, issues of race, gender, and politics, the hearing and all of the events that surrounded it deserve honest assessment."[23] A year after the Hill-Thomas hearings, a *Wall Street Journal* poll also found that national opinion had flipped in favor of Anita Hill. 44 percent believed her while 34 percent believed Thomas.[24] Hill has speculated that the change in perspective in the months since the hearing had to do with the fact that people were more aware of sexual harassment than before. The same holds true today as the movement against sexual harassment takes hold–the country has become more aware than ever before and it has led us to believe women's truth, which has made all of the difference.

21 Massie, "How racism and sexism shaped."
22 Morrison, "Race-ing Justice, En-gendering Power."
23 Hill, "Speaking Truth to Power."
24 Massie, "How racism and sexism shaped."

# The Stakes of International Human Rights:
## *Interview with Stavros Lambrinidis, European Union Special Representative for Human Rights*

Conducted by April Xiaoyi Xu (PO '18), *Editor-in-Chief* and
Milo Kremer (PO '20), *Staff Writer*
Transcribed by Milo Kremer

*Stavros Lambrinidis has been the European Union's Special Representative for Human Rights since 2012. He previously served as Minister for Foreign Affairs of Greece and Vice President of the European Parliament. A graduate of Amherst College and Yale Law School, Lambrinidis served as managing editor of the* Yale Journal of International Law. *On February 16th, Lambrinidis spoke with the CJLPP prior to his Ideas @ Pomona talk titled "What's So Scary About Smart Girls? And Other Fun Questions About Human Rights."*

**CJLPP**: Mr. Lambrinidis, your role as a Special Representative for the European Union (EU) is unique; you have an intentionally flexible mandate as a representative for human rights. How would you describe your role now?

**Stavros Lambrinidis**: I have been tasked with spearheading the EU's human rights foreign policy. I would say that my role is to visit some of the most difficult countries in the world with some of the most serious human rights violations, and try to find the appropriate approach to bring positive change for the people on the ground. I also focus on countries that may be in the process of democratic, social or economic transition—places like Myanmar in 2011, or the Gambia since last year, or Guatemala, or Bahrain a few years ago, countries that could go either way, and depending how they go could affect the greater region as well. And finally, I also visit countries that actually have good human rights records, to build strong human rights alliances and help spread positive narratives and best practices.

The interesting thing with human rights in the past few years is that the "bad guys" have become much more effective at playing offense. So, until recently, they had been telling us that we have no right to intervene in their affairs, that we are violating their sovereign rights by doing so. But now they're beginning to try to export their negative narratives and practices of human rights to others; they're trying to increase their world influence, if you like. That being said, there are a number of countries around the world—in all cultures and in all regions—that are actually pretty good at human rights. Because you don't read about them in the newspaper headlines—there are no massacres, no violent oppression—you rarely tend to notice or visit them. All the good countries from around the world have never actually gotten together to create a coalition of positive and inspirational stories about human rights. It's about time they started doing so.

**CJLPP**: So you elevate the positive stories and try to find solutions to the negative ones?

**Lambrinidis**: Indeed. The European Union, or anyone else for that matter, has the power to bring change from the outside. One of the things in human rights (as in much of foreign policy) is how you support civil societies and governments to take ownership of their own human rights agenda without you appearing to be in the lead. Because, in fact, human rights can rarely be "imposed" from the outside. So, if your goal in policy is to go and "plant your freedom flag" and declare to the world, "Look, I came to this country. It is now doing fantastic because of me," hoping that people would focus on your work as opposed to the country itself, then you are doing a disservice. This is because the whole point is to make the country itself proud, not because it is under your own influence, but because it is under the influence of its own ownership—of its own peoples' ownership—of human rights. What I do, in many instances, is to keep the lowest possible political profile when I go into different countries. This is a counterintuitive thing for a politician to do. But if you are going to do human rights well, then you cannot be appearing as though "the West" is going around telling others what to do. If you fall into that trap, then you muddy the waters before you even begin.

**CJLPP**: How do you think your role in this flexible mandate has changed since your appointment in 2012, and do you see it changing any further?

**Lambrinidis**: When I first assumed duty, I focused most of my time on the countries that were the biggest violators of human rights. And, five years later, I focus an increasing amount of my time on countries and on organisations that can create a coalition of good human rights stories.

In particular, civil society has seen its space in many countries shrink. Funding has been cut off or civil society activities have been blocked by some governments. Its reputation has been smeared; even when there is no direct repression of civil society, governments may still smear civil society's reputation so that people are afraid to interact with or participate in it. Civil society around the world engages every day in actions that generate overwhelmingly positive narratives. Advocating for human rights is not all "Arab Spring". The story peddled by many human rights violators is that whenever people revolt against an oppressive leader terrible things happen and thus they should stay quiet. Advocating for human rights can, in fact, be forceful and peaceful, like in Burkina Faso or in Ghana, or in Korea where the candlelight vigils recently led to a peaceful change in the government. There is a very important stabilising role of civil society with respect to freedom of expression and assembly that allows for frustrations to be expressed before they reach the boiling point. So today I focus more on the positive stories, while still forcefully addressing the difficult and bad stories.

**CJLPP**: Our next question is on international law. One perspective in international academic and media discourse is that there is a trend of proliferation of human rights. For example, Jacob Mchangama and Gugielmo Verdirame (founders of the Freedom Rights Project) write in a *Foreign Affairs* op-ed about how "when everything can be defined as a human right, the premium on violating such rights is cheap". From a legal perspective, would you concur with that? And would you say that a narrower, more clearly defined set of rights would be more helpful in promoting respect for international human rights through more robust monitoring and enforcement?

**Lambrinidis**: Human rights are clearly defined in international conventions and often too in domestic constitutions and laws—they do not include "everything under the sky."

The real challenge today is not, in my view, that "too much" accountability is being sought for the violation of human rights (thus "cheapening" them), but rather that accountability for even some of the gravest human rights violations—look at Syria, for example—and for other violations, is often increasingly difficult to come by. If a police force feels like it can beat up protesters with impunity; if a husband can kill his wife in a fit of jealousy with impunity because a government will not arrest him; if the military in a country like Myanmar feel that they can eject a whole people because of their religion with impunity; then, it is obvious that the next violator who wishes to do something like this will not feel restrained by legal considerations. The problem in these cases is that the major enforcer of human rights in any country is the judicial system in that country itself, and many legal systems (from arrest and interrogation to prosecution and judgment) are still weak. Internationally, there is the International Criminal Court (ICC), of course, but that is for the most egregious violations such as crimes against humanity and genocide. It is often difficult to reach that level of proof. Also, not all countries are signatories to the ICC. The EU is among the biggest supporters of the ICC. We require all of our members to be members of the ICC. Every year, we launch a diplomatic campaign with every single country in the world in which we ask that they sign on to the ICC, if they have not already.

But there are also cases of regional human rights mechanisms that strongly support human rights. Europe is the most classic example where you have the Council of Europe—a broad gathering of countries in all of Europe, including all EU member states but many more as well—that has the European Court of Human Rights. Every citizen within the Council of Europe, once they exhaust their remedies in their national jurisdiction, can then go to the European Court. The Court condemns those who violate the European Convention for Human Rights. The challenge with this court is enforcement; once the decision has been made, how can the court enforce it? There usually is a particular element of the violation, so the government has to pay some money, release someone wrongly imprisoned, etc., but the court also focuses on the broader root causes of the violation, the systemic failures in a country, and requests that the government address the them as well. This work is often much more difficult to enforce.

The African Union has its own court—the African Court for Human and People's Rights—which is an entirely different kind of jurisdiction. It is a relatively new court. The EU is extremely supportive of it. That court is only now beginning to directly accept lawsuits from citizens of different member states of the African Union. But to use this court as a citizen, you first need your government to have agreed that citizens can directly bring cases in front of it. Relatively few African governments to date have agreed to that mechanism—but still a larger number than five years ago, when I assumed my duties.

Accountability is important in human rights. And, this is where the tension with civil society often comes in. Civil society, human rights NGOs, and NGOs in general tend to be the watchdogs of any government. Oppressive governments (non-oppressive governments too, sometimes) recognise that if they can in some way intimidate or silence their active civil society, then they can also avoid a lot of accountability.

I am glad for this question because it puts its finger on an important yet neglected feature of human rights. Human rights are not a romantic concept where some countries around the world got together one day and held hands and sang "kumbaya". These rights are hard-core international law. They are legal instruments. The International Covenants of Civil and Political Rights and of Economic, Social and Cultural Rights are legally binding instruments that have been signed and ratified by virtually every country in the world and transposed in domestic legislations (if not effectively transposed, then it is a violation of the conventions themselves). Many people don't know that. They think that when people complain about human rights it is simply trying to impose my views or culture on yours. In fact, none of that is the case. It is instead an obligation to impose international legal obligations that everyone has accepted and that is what we are trying to do.

**CJLPP**: Do you see any other major limitations of the international human rights system based on your professional expertise?

**Lambrinidis**: One challenge in protecting human rights has to do with some peoples' perception that not all rights are equally important in all countries, cultures, or political systems. But in fact, all human rights—economic, social, cultural, civil, and political—are interrelated and interdependent. So, it is virtually impossible to talk about respecting one kind of right without respecting another. Here is a practical example: There is a civil-political right of non-discrimination against women. But you can't have non-discrimination against women if girls in a particular country are being forcibly married when they are young. If you are forcibly married young, in addition to being forced to do something you do not want to, you will, in the majority of cases, stop going to school as well. But education is a social right, without which a woman cannot fully exercise her civil and political rights. In that sense, although there are so many rights that you may see as separate and divisible, you must understand that there is no way for these rights to be effective unless they are seen as a unified whole.

China, to give you another example, is a country that has brought hundreds of millions of people out of poverty in an otherwise oppressive civil-political system. The Chinese Communist Party controls the economy; it brought a lot

of people into relatively cheap jobs—in the process it created a lot of new social and economic inequality—but they had been in destitute situations so these jobs were relative improvements. Getting people out of poverty is of course a good thing. But without freedoms, you are assuming that human beings have, or are entitled to satisfy, only base animal needs, which is in clear conflict with the notion of "human dignity" upon which all human rights are based. What's more, the question with regards to China, if you're going to go from a country where things are "made in" to a country that is proud of having things that are "designed in" the country (a stated Chinese goal), then can you possibly achieve this without freedom of thought and expression? Is it possible to make that transition unless, for example, you have a free press to exchange different views or free universities, like Pomona, where people can throw out any controversial, irreverent or politically unpleasant to the ruling party idea they have and explore those ideas with each other to agree or disagree? That transition is not possible without such freedoms. There are crucial connections across rights.

Another challenge of the international system is that human rights have become very politicised. If you listen to human rights debates, you will see that it often deteriorates to, "the West says this because they are arrogant imperialists" or, on the other side, "you violate this or that right, therefore you must be a 'misogynist,' a 'racist' or a 'fascist'." When people tell me that human rights are a Western concept that are being manipulated to impose Western values on others, I tell them that their argument is untrue and dangerous. Indeed, were that argument to take hold, then every country in the world according to its own interpretation of its own culture could pick and choose what rights to apply. And that, by definition, would be the end of the international human rights architecture.

The reason that this is an entirely false argument is because human rights have never been a battle between different cultures or political systems, or regions, or ideologies. They have instead always been a battle within these different systems. Human rights have always been the universal language of the powerless against the cultural relativism of the powerful, within any different region, political system, culture or religion of the world. A woman being abused by her husband in Los Angeles, or in Athens, or in Beijing, or in Riyadh or in Brasilia—she would probably never tell you: "you have no right to intervene on my behalf, please leave me alone to be abused because human rights are not universal; they are Western constructs". She is the powerless. The husband doing the abusing, and the government who refuses to arrest him, will often tell you to keep away because there they have "special family values" that you don't understand or respect. Those people are the powerful.

To anyone who is trying to regionalise or relativise human rights, I remind: the notion of human dignity—upon which all rights are based according to the United Nations Universal Declaration of Human Rights, whose 70th Anniversary we celebrate this year—belongs equally to the traditions of the north, the south, the east, and the west. If you go to any culture, to any religion, and ask them if they are based on protecting human dignity, they will emphatically say yes. That is what human rights are based on. To those who try to politicize human rights—to make it an issue between the Right and the Left—I propose that this is not a matter of "Right" or "Left," but a simple matter of "right" and "wrong" when treating other human beings.

**CJLPP**: In your 2013 speech at the Institute for International and European Affairs (IIEA), you said that you are a "fanatic advocate" of cooperation between European political institutions and NGOs on human rights issues. What do you see as some challenges and some advantages of cooperation projects among individual states, regional organisations, and NGOs?

**Lambrinidis**: I would say that one challenge governments face is that they have to learn how to take criticism. They also have to learn how to take expertise and support from civil society that may not have come from a governmental representative. Civil society often supports; it does not always criticise. Governments have to learn how to accept both things. Sometimes you get resentful about a good idea because it did not come from you. Other times you get criticism, and you immediately shut your ears.

Being half serious, when some major human rights NGO calls my office to see me, I know that it is almost never to tell me what a terrific job I am doing! [Laughter] Now, I wouldn't mind every once in a while hearing that not everything is a disaster. But here's the thing: civil society can be nice to governments if it wants to, but it does not have to, that's not its role. And that is the challenge that governments face. In oppressive systems, or in systems that may not necessarily be oppressive but have yet to learn how to work with their citizens, or in systems where there is a presumption that democracy ends at the ballet box and does not instead begin there, in all those systems, governments often have trouble tolerating citizen action. Then, of course, you have the extremes: governments simply trying to repress civil society. That is a big challenge that we face.

Civil society itself also faces challenges. Some of these challenges are objective, such as finding funds to do their work and to pay their employees. In some countries, civil societies are just poor. There are no funds that one can get other than from the government, or through outside funding. That is when often civil society is unfairly accused of being "foreign agents" or "spies" of foreign interests, even though others simply support the causes that civil society itself has claimed as its priorities, not causes imposed by outsiders. Unfortunately, this outside support can be emphasized by governments to undermine civil society. Civil society around the world is beginning to discuss more extensively how it can fundraise effectively through individual citizens and the private sector within its borders as well.

**CJLPP**: To what extent do you see the private sector as an important supporter of human rights?

**Lambrinidis**: It can often, if not always, be an important promoter of rights. Take, for example, a huge American or European business that goes to a foreign country and employs a number of subcontractor companies from that country to produce goods. If that business insists on equivalent labor standards and human rights that it applies in its own home country, or as prescribed in the International Labor Organization conventions, then it can make a huge different in promoting universal human rights. In some in-

stances these businesses do insist on abiding by these standards and rights, and they are leaders in human rights. In other instances, they do not, taking a more short-sighted view of both their long-term reputation and "making a profit." In that case, the United Nations Guiding Principles on Business and Human rights of 2011 say that they have also to be held accountable.

**CJLPP**: Moving on to the final part of our interview today, we would like to ask some more personal/career-oriented questions. How did you decide to pursue a career in law? We are especially interested in your perspective as a fellow liberal arts college graduate from Amherst College.

**Lambrinidis**: If I'm honest, I have to say that I chose to go to law school because I had absolutely no idea what I wanted to do with my life! At Amherst I majored in political science, psychology and economics. That is an indication that I had multiple interests, but no specific "professional" focus. As I approached graduation, I was aware of the prospect of having to immediately return to Greece if I didn't do something else. I thought that, lost as I was, the closest thing to not being a physicist, or a chemist, or any of those things that my brain was not wired to do, was going to law school. Going to law school opened so many doors. When I graduated, I became a lawyer at a major law firm in Washington, D.C. doing a lot of international trade and arbitration work. At the same time, I participated in many pro-bono human rights cases as a young associate with the D.C. Bar Association. When I eventually went back to Greece, I had developed both a "technical" background in dealing with complex legal and policy matters and a political understanding of things to engage in politics there. I also suppose that, for a number of personal reasons and experiences, in every single part of my career the sense of responsibility to protect the weak against political injustices was always part of my DNA.

In college and law school I also learned how to listen to and understand others' perspectives. In some way, to do the job I'm doing now, you have to be fundamentally able to listen and to understand what the other person feels—if they are the oppressed or even if they are the oppressor. In my job, I have to sometimes go to very dark places. I have to talk to some very dark-minded people. And I have to understand where they are coming from. Because, to have the slightest chance to influence them to change, you need to first know what makes them tick—to then decide how to best persuade or, if need be, pressure them to change things to the better. You also need to feel and understand, from the people who demand a better life from their leaders, what they are seeking and what they truly need.

**CJLPP**: Do you have any suggestions for students who are interested in pursuing a career in international human rights law? Do you think that US law schools are doing a good job teaching international law?

**Lambrinidis**: US law schools are obviously a way to go—as a foreigner, that was the rather risky path that I chose, given that a US J.D. degree guaranteed no stable career path either in the States or in Europe. There are also European law schools that are highly advanced in international law—in Strasbourg, the Netherlands, Brussels, and elsewhere—that teach many of their courses in English. I would encourage anyone who studies in the States to try to take a semester abroad in Europe, or to use the Erasmus Plus programs where the EU can cover costs for your fellowship to study at a European university. I would certainly encourage trying your hand with civil society organizations in the US and abroad, by volunteering to combat some issues. Now, you may think that human rights work might not be your thing, that if you choose to do human rights you will have to wake up every morning weeping because of the suffering of people in the world. In fact, you can be someone who is extremely committed to fighting injustice without needing to be in the field every day dealing directly with people's suffering. You could be someone who enjoys being behind the desk, writing the legal brief that will save the DREAMers from deportation, for example.

Do not assume that there is one path to enter international law. In order to find what your path may be, try a lot of different paths. Do not always assume that you must go to the most remote places in the world to do human rights. Participate in human rights here! Be active in your community. If the free, quality press in the United States or in Europe is under threat because it is being intentionally maligned, or because its credibility is under attack from the presumption that every outlet, from an extremist blog to a mainstream newspaper, espouses "fake news", then stand up and protest that, try to identify and to show the difference. Push to isolate politicians who try to weaken and to bend to their own will independent institutions that provide the checks and balances in a democracy. Simultaneously, understand and try to promote media education so that people begin to learn from an early age how to distinguish facts from misinformation. Another example: if a court is being politicised or controlled by corruption, as is the case in many countries in the world, then stand up. The moment you lose checks and balances in any society is the moment that the powerful win over the powerless. The reason that democracies have managed to be such a success is because they recognise the coexistence of the powerless and the powerful and have thus set up mechanisms to prohibit the powerful from always imposing their will on the most vulnerable and on minorities. At least, that is the way it should work.

**CJLPP**: Thank you so much for your time and expertise, Mr. Lambrinidis.